COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-_____

Appeals Court Case No. 2016-P-1733

JANE DOE NO. 1 and others,
Plaintiffs-Appellants,

v.

JAMES A. PEYSER and others,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
FOR SUFFOLK COUNTY, NO. 2015-2788-F

APPLICATION FOR LEAVE TO OBTAIN DIRECT APPELLATE REVIEW

Michael B. Keating (BBO# 263360)
Daniel L. McFadden (BBO# 676612)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
mkeating@foleyhoag.com
dmcfadden@foleyhoag.com

Paul F. Ware Jr. (BBO# 516240)
Kevin P. Martin (BBO# 655222)
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
(617) 570-1000
pware@goodwinprocter.com
kmartin@goodwinprocter.com

William F. Lee
(BBO# 291960)
Felicia H. Ellsworth
(BBO# 665232)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
william.lee@wilmerhale.com
felicia.ellsworth@wilmerhale.com

Attorneys for Plaintiffs-Appellants Jane Doe Nos. 1-2 and John Doe Nos. 1-3

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I. INTRODUCTION AND REQUEST FOR DIRECT APPELLATE REVIEW

Plaintiffs-appellants, five children assigned to schools that chronically fail to educate those who attend them, filed a complaint in Superior Court seeking to vindicate their constitutionally guaranteed right to an adequate education. Specifically, these children challenged G.L. c. 71, § 89(i) (the "charter cap"), which restricts the percentage of a school district's funding that may be paid to charter schools and therefore caps the number of children who can attend charter schools in any given school district. The charter cap arbitrarily and unfairly deprives thousands of children in the poorest districts of access to a proven means of obtaining an adequate education -- even as all children in neighboring, wealthier towns have access to quality schools. Without allowing any discovery, the court below dismissed Plaintiffs' complaint, holding that they did not state a claim for violation of either the Education Clause or the equal protection principles of the Massachusetts Constitution.

In doing so, the Superior Court applied an incorrect standard to Plaintiffs' Education Clause claim, holding that a violation could be demonstrated only by the existence of an "egregious, Statewide abandonment" of the Commonwealth's duty to educate its children. Similarly, rather than appropriately

recognizing education as a fundamental right, the Superior Court relegated it to second class status and applied only rational basis review to Plaintiffs' equal protection claim. If uncorrected, these errors would substantially weaken the protection offered to the Commonwealth's children by the Massachusetts Constitution.

Deprived of their right to an education by the Commonwealth and denied relief in the Superior Court, Plaintiffs now petition this Court for direct appellate review of the Superior Court's judgment. The Court should take this case and resolve the important constitutional questions it raises before yet another generation of children is failed by the Commonwealth.

The Plaintiffs, Jane Doe Nos. 1-2 and John Doe Nos. 1-3, are five Boston public school students who were assigned to attend inadequate district schools. Each entered a lottery to attend a charter school, but lost that lottery and was assigned instead to a district school that, for years, has failed to teach more than half its children to be proficient in any subject. This left Plaintiffs with two unacceptable options: attend the inadequate public schools to which they were assigned, or incur significant personal expense and hardship to attend non-public schools. They therefore initiated this lawsuit, on

behalf of a class of thousands of other similarly-situated students, to vindicate their constitutionally guaranteed right to an adequate education.

The Superior Court dismissed the case because it concluded that the Plaintiffs had failed to state a claim on which relief could be granted, and that no information learned in discovery could change that result. That decision was in error.

First, the Superior Court imposed a far higher standard for stating an Education Clause claim than required by McDuffy v. Secretary of Exec. Office of Educ., 415 Mass. 545, 606 (1993). It improperly held, based on dicta from Hancock v. Commissioner of Educ., 443 Mass. 428, 433 (2005) (plurality opinion), that Plaintiffs had not stated a claim because they had "not alleged the kind of 'egregious, Statewide abandonment of Constitutional duty' necessary to show a violation of the education clause." ADD46 (quoting Hancock, 443 Mass. at 433 (Marshall, C.J., concurring)).[1] In other words, the Superior Court held that if the Commonwealth is adequately educating some children the rest have no cause of action.

That is not the law. In 1993, this Court interpreted the Education Clause to impose a judicially enforceable duty on the Commonwealth "to

[1] References to "ADD__" are to the Addendum to this application.

provide an education for all its children, rich and poor, in every city and town of the Commonwealth." McDuffy, 415 Mass. at 606 (emphasis in original). The Court found this clause was violated based on evidence that the Commonwealth had failed to provide an adequate education in a number of less affluent communities, even as it noted that students in more affluent communities were obtaining an adequate education. No showing of "Statewide" abandonment was required. In Hancock, this Court then explained that the Education Clause prohibits the Commonwealth from acting "in an arbitrary, nonresponsive, or irrational way" with respect to public education, 443 Mass. at 434-435, or relying on "criteria extrinsic to the educational mission." Id. at 454.

The Superior Court's "egregious, Statewide abandonment" standard holds the government to a far lower standard than the Education Clause, as interpreted by this Court, requires. This Court should take this case on direct appellate review to clarify any uncertainty resulting from Hancock's dicta.

Second, the Superior Court erred by failing to recognize that an adequate education is a fundamental right and that government decisions depriving children of that right should be subject to strict scrutiny. The Commonwealth's commitment to education is

enshrined in its Constitution. See Mass. Const., Part II, c. 5, § 2. As this Court has explained, "the framers" of the Massachusetts Constitution "conceived of education as fundamentally related to the very existence of government." McDuffy, 415 Mass. at 565. The Superior Court's relegation of educational rights to second class status, and the application of only rational basis review to Plaintiffs' equal protection claim, was legal error, and this Court should reverse it.

In any case, even under rational basis review, the Plaintiffs have adequately pled a claim under the Commonwealth's equal protection provisions. The burden of the charter enrollment cap -- an arbitrary limit that furthers no legitimate educational goal -- falls squarely and disproportionately on children in less affluent districts like Boston. The Superior Court committed error by resolving, on a motion to dismiss, a fundamentally factual issue -- whether the law serves a legitimate purpose -- when it ruled that, no matter what facts developed in discovery reveal, the law is rational. Without evidence concerning the impacts of the cap in practice, the Superior Court should not have reached that holding.

The Superior Court's misapplication of this Court's precedents in evaluating Plaintiffs' claims under both the Education Clause and equal protection

principles warrants this Court's review. The petition implicates "questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court"; "questions of law concerning the Constitution of the Commonwealth ..."; and "questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." Mass. R. A. P. 11(a). Thus, direct appellate review is warranted.

II. STATEMENT OF PRIOR PROCEEDINGS

Plaintiffs are five Boston children who were assigned to inadequate Boston district schools. Each entered a lottery to attend publicly-funded charter schools in Boston. All of them lost those lotteries and were unable to attend those schools. Plaintiffs filed this suit, alleging that the Commonwealth has violated the Education Clause and equal protection principles by failing to provide them with an adequate education, specifically by imposing an arbitrary barrier to such an education in the form of the cap on charter school enrollment. Plaintiffs sought injunctive relief and a declaration that the Commonwealth had violated the Education Clause and infringed their right to equal protection.

Defendants moved to dismiss the complaint. They argued that the Superior Court lacked jurisdiction, asserting that no "case or controversy" existed

warranting the judiciary's attention. They also argued that Plaintiffs lacked standing to bring their claims, observing that Plaintiffs had not applied to every single charter school throughout Boston, but only some of them. Finally, Defendants argued that Plaintiffs had failed to state a claim under either the Education Clause or equal protection principles.

The Superior Court granted Defendants' motion to dismiss. The court held that an actual case and controversy existed between the parties and that Plaintiffs had standing to pursue their claims. Nonetheless, it dismissed their case, agreeing with Defendants that the Plaintiffs had failed to state a claim on which relief could be granted.

Plaintiffs filed a timely notice of appeal on October 13, 2016. Plaintiffs' appeal was docketed in the Appeals Court on December 27, 2016.

III. STATEMENT OF RELEVANT FACTS

A. Plaintiffs' Allegations

1. The Massachusetts Constitution Requires The Commonwealth To Provide An Adequate Education To All Children In The State

In 1780, the framers of the Massachusetts Constitution placed upon the government, "in all future periods of this Commonwealth," the obligation to "cherish" the public schools and provide for the diffusion of wisdom and knowledge to all the children of Massachusetts. Mass. Const. Part II, c. 5, § 2.

In the centuries since, Massachusetts has prized its status as the home of some of the world's leading universities and some of the nation's best public schools.

Despite this laudable history, in 1993, the Supreme Judicial Court recognized that the Commonwealth had fallen short of the constitutional standard. In McDuffy, this Court recognized "the reality ... that children in the less affluent communities (or in the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution." 415 Mass. at 614. The Court further held that the courts of a state committed by its constitution to "cherish" the public schools could not tolerate such inadequacy: "[T]he words are not merely aspirational or hortatory, but obligatory .... [T]he Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth ...." Id. at 606 (emphasis in original). "[T]he duty to educate is an enforceable one[.]" Id. at 607.

Legislation followed. The Massachusetts Education Reform Act of 1993, G.L. c. 69-71 (1993) ("the '93 Act"), passed within days of this Court's decision in McDuffy, provided for new standards and assessments (id. § 29), overhauled the state's system

of education funding (id. § 32), and authorized the creation of a limited number of charter schools "to provide parents and students with greater options in choosing schools" (id. § 55).

Surveying these and subsequent developments in 2005, in Hancock, a plurality of this Court concluded that while "many children in the focus districts [we]re not being well served by their school districts," the Commonwealth had demonstrated that it was proceeding with a "comprehensive process of reform," and that the court would not intervene absent a "show[ing]" that the Commonwealth was "acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate." Hancock, 443 Mass. at 435 (plurality opinion). The "comprehensive process of reform" presented to the court in Hancock included a target of 100% of Massachusetts students achieving proficiency on English and mathematics standardized tests by the year 2014. Id. at 440.

Five years later, further legislation followed. The Achievement Gap Act of 2010 and its implementing regulations established a system for classifying schools in one of five levels based on performance. G.L. c. 69, §§ 1J, 1K. Under the new accountability system, the lowest-performing 20% of schools may be categorized as Level 3. See id. § 1J(a); 603 CMR § 2.04(2). Schools identified by the commissioner as

in the bottom 4% of schools, based on measures including standardized test performance and growth, high school graduation rates, and student attendance, may be categorized as Level 4 or Level 5. 603 CMR §§ 2.05(2), 2.06(2). Each category of school is subject to an escalating series of local and state interventions. G.L. c. 69, § 1J. The Act further allowed for the authorization of additional charter schools, while keeping in place caps on the number of such schools and the amount of funding they could receive. G.L. c. 71, § 89(i).

Since 2010, the political system's efforts to address the needs of students attending low-performing schools have stalled. In July 2014, legislation that would have further increased the number of charter schools failed to clear the state Senate. See Claire McNeill, Mass. Senate Rejects Bill to Raise Charter School Limit, Boston Globe (July 16, 2014). In spring 2016, the state Senate passed legislation raising the caps on charter school growth and making other reforms. See Rachel Slade, The Great Charter Schools Debate, Boston Magazine (Sept. 2016). But the House of Representatives took no action. See id.

Most recently, the question whether to increase the educational options available to students in persistently underperforming school districts was put to a popular vote. On November 8, 2016, voters were

presented with a ballot initiative to "allow the State Board of Elementary and Secondary Education to approve up to 12 new charter schools or enrollment expansions in existing charter schools each year." Office of the Secretary of the Commonwealth, 2016 Ballot Questions (accessed Jan. 13, 2017). A majority of voters opted not to support the measure, thereby leaving state education law unchanged.

2. The Commonwealth Has Failed To Provide Plaintiffs With An Adequate Education

More than two decades have passed since McDuffy's finding that children attending less affluent schools are being deprived of their constitutional entitlement to an education. Yet despite periodic legislative efforts at reform, every day children in less affluent districts across the Commonwealth continue to be deprived of the education their constitution -- and this Court -- has said they are due. The "comprehensive Statewide plan for reform" the Court deferred to in Hancock set the goal of 100% proficiency by 2014 -- but 2014 has come and gone, and many children are still not receiving an adequate education.

Quite the opposite, particularly for children in low income and minority communities such as Plaintiffs. In Boston, only 28% of low-income fourth grade students scored proficient or above on the most recent National Assessment of Education Progress

mathematics test, compared to 68% of their higher-income peers. U.S. Dep't of Educ., Inst. of Educ. Sciences, NAEP Mathematics: Trial Urban District Snapshot Report: Boston (2013).[2] And although Massachusetts boasts one of the nation's highest high school graduation rates, it also has one of the most glaring racial gaps: while 9 out of 10 of the Commonwealth's white students don a cap and gown, 1 in 4 black students and nearly 1-3 Hispanic students do not complete high school in four years. U.S. Dep't of Educ., The Condition of Education 2016, at 4, 6 (2016).[3]

The Plaintiffs illustrate this persistent inadequacy. Each was assigned to attend a school that for five years had failed to teach even half of its students to be proficient in any tested subject: math, reading, or science. ADD66-68 (¶¶ 49, 52, 56, 60, 64). Each school had been designated Level 3 or Level 4. ADD66-68 (¶¶ 51, 55, 59, 63, 66). All of these schools "fail[] to teach children many of the skills that the Supreme Judicial Court identified in [McDuffy] as the hallmarks of a minimally adequate education." ADD68 (¶ 67).

[2] Available at http://nces.ed.gov/nationsreportcard/subject/publications/dst2013/pdf/2014468XB4.pdf.

[3] Available at http://nces.ed.gov/programs/coe/pdf/coe_coi.pdf.

3. Charter Schools Offer Students A Viable Alternative

Faced with the prospect of attending a constitutionally inadequate school, each Plaintiff applied to attend a charter school. First authorized in Massachusetts by the '93 Act, charter schools are public schools that receive charters to operate from, and are overseen by, the Board of Elementary and Secondary Education ("BESE").[4] Charter schools operate independent of district school committees and are managed by their own boards of trustees. G.L. c. 71, § 89(c). Like other public schools, charter schools receive funding on a per-pupil basis. G.L. c. 71, § 89(ff). When more students wish to attend a charter school than capacity allows, charter schools conduct a

[4] The model of charter school authorized by the '93 Act is now referred to in statute as a "Commonwealth charter school." The term "charter school" as used in this petition refers to these Commonwealth charter schools. Massachusetts law now authorizes a second model of charter schools -- "Horace Mann" schools. G.L. c. 71, § 89(a), (c). While Commonwealth charter schools have expanded to reach the tuition-based cap (as discussed further below), which now constrains their growth, Horace Mann schools have not presented a viable alternative for Plaintiffs -- or students like them -- seeking an adequate alternative to their failing district schools. Indeed, while applications for the expansion of Commonwealth charter schools have been denied because of the cap, and thousands of students remain on waitlists to attend those schools, as Defendants stated in their briefing in the Superior Court, there continue to be "only 9 Horace Mann charter schools ... operating in the Commonwealth." ADD110.

random lottery for admission. G.L. c. 71, § 89(n).

To open a charter school, an applicant must complete an exacting comprehensive review process, G.L. c. 71, § 89(e), and must subsequently apply for renewal every five years, id. § 89(dd). During that renewal process, BESE considers criteria including the school's academic achievements, curricular innovations, and recruitment and retention of students. Id. In exchange for this high level of accountability, charter schools receive greater autonomy than district schools, including over matters such as curriculum, budget, and staffing.

The remarkable track record of charter schools in educating the Commonwealth's students has been established by rigorous independent research. In 2009, researchers at Harvard University's Center for Education Policy and Research found that the academic performance gains among Boston charter school students were significantly greater than those of their peers who also had applied to charter schools but were denied admission through the lottery. See Atila Abdulkadiroglu et al., Informing the Debate: Comparing Boston's Charter, Pilot, and Traditional Schools, The Boston Foundation (2009). The authors concluded that charter schools in Boston "appear to have a consistently positive impact on student achievement in all MCAS subjects in both middle school

and high school." Id. at 39. A 2011 follow-up study yielded similar results, showing "large, positive, and statistically significant effects on ELA and math scores" in urban middle schools. Joshua D. Angrist et al., Student Achievement in Massachusetts' Charter Schools, at 1, Center for Education Policy Research, Harvard University (2011).

In 2013, Stanford's Center for Research on Educational Outcomes ("CREDO") found that "[t]he average math and reading growth found in Boston's charter schools is the largest state or city level impact CREDO has identified thus far." CREDO, Charter School Performance in Massachusetts, at 16 (2013). That same year, a study from researchers at MIT's School Effectiveness and Inequality Initiative bolstered these findings: "The results reported here show that the causal impact of attending a year at a Boston charter school is large and positive in both [math and reading] and both [middle and high] school levels." Sarah R. Cohodes et al., Charter School Demand and Effectiveness, at 3, The Boston Foundation (2013). In another study, the same researchers concluded that attendance at a Boston charter school raises the probability that students pass exams required for high-school graduation, increases the likelihood that students qualify for an exam-based college scholarship, increases the frequency of

Advanced Placement test-taking, substantially increases SAT scores, and increases the likelihood that students attend a four-year college. See Joshua D. Angrist et al., Charter Schools and the Road to College Readiness, The Boston Foundation (2013).

Last year, a study from the same MIT initiative found that these benefits are available to all students. The study's author found that "special education and [English language learner] students experience large academic gains in charter schools: over 0.26 standard deviations in math and over 0.19 standard deviations on English on the state standardized exams." Elizabeth Setren, Special Education and English Language Learner Students in Boston Charter Schools: Impact and Classification, at 1, M.I.T. School Effectiveness & Inequality Initiative (2015). Summarizing recent research, the Department of Elementary and Secondary Education itself recently concluded that "students with the most severe needs -- special education students who spent the majority of their time in substantially separate classrooms and English language learners (ELLs) with beginning English proficiency at the time of the lottery -- perform significantly better in charters than in traditional public schools." Mass. Dep't of Elem. & Sec. Educ., Charter School Enrollment Data Annual Report, at 1 (Feb. 2016).

4. Because Of The Charter Cap, Students, Like The Plaintiffs, Are Unable To Access The Opportunity For An Adequate Education Offered By Charter Schools

There is, in short, voluminous evidence that charter schools could provide an adequate education to the Plaintiffs and the thousands of students like them who are consigned to inadequate schools. In the hopes of obtaining an adequate education, each Plaintiff applied to a charter school in 2015. None received a seat, due to the restrictions on charter schools that the Commonwealth has imposed. Specifically, Massachusetts law restricts the percentage of a school district's funding that may be paid to charter schools. G.L. c. 71, § 89(i). Since 2010, this percentage has varied by district: 9% for the majority of districts, and a percentage rising to 18% for the lowest-performing 10% of school districts in the state. Id. Because the funding for charter schools is tied to attendance, the funding cap is a de facto attendance cap.

This cap has, and will continue to, constrain the growth of high quality schools that Plaintiffs would otherwise be able to attend. See ADD43. As the Superior Court noted, one of the defendants, Department of Elementary and Secondary Education Commissioner Mitchell D. Chester, admitted as much. In a February 12, 2016 letter to the BESE, he stated

that “we have more high quality charter amendment requests for Boston from qualified applicants than we can accommodate under the statutory net school spending (NSS) cap” and “a number of applications came from schools with track records of performance that, if more seats were available in Boston, have the potential to be strong candidates for my recommendation.” ADD40 (n.10).

The burden of this cap falls disproportionately on “children in the less affluent communities (or in the less affluent parts of them).” McDuffy, 415 Mass. at 614. In more affluent communities where public schools are consistently high-performing, children’s educational fates are not determined by lottery. But in communities like those of the Plaintiffs, winning a lottery for access to charter schools may be the only way to obtain an adequate education.

B. The Superior Court’s Decision On The Defendants’ Motion To Dismiss

The Defendants moved to dismiss on the grounds both that the Superior Court lacked subject matter jurisdiction over the case and that Plaintiffs had failed to state a claim for which relief can be granted. ADD102. The Superior Court’s October 4, 2016 order granting Defendants’ motion to dismiss held that the court had subject matter jurisdiction over the case, but that Plaintiffs had failed to state a claim under the Education Clause or equal protection

principles.

1. The Superior Court Concluded That Subject Matter Jurisdiction Exists Over This Case

The Superior Court correctly understood the allegations of the complaint to focus on the availability of Commonwealth charter schools as an adequate substitute for the failing schools to which Plaintiffs had been assigned. ADD41. These schools are subject to the funding cap and Plaintiffs alleged that, because of this cap, "there are 'thousands' of students who have been denied entry to public charter schools because 'the demand for entrance to public charter schools [is] much higher than the supply of classroom seats.'" ADD43 (alteration in original). The court thus held there is a real case or controversy because the funding cap "is unlikely ... to permit enrollment by the number of students who seek admission." ADD43. The court further held that Plaintiffs had standing because they "adequately alleged that their rights have been impaired ... because they argue that [the charter cap] impedes their ability to obtain a quality education." ADD44.

2. The Superior Court Held That Plaintiffs Had Failed To State A Claim Under The Education Clause

Turning to the merits, the Superior Court dismissed Plaintiffs' Education Clause claim. The court acknowledged this Court's admonition in McDuffy

that "[t]he education clause 'obligates the Commonwealth to educate all its children.'" ADD47 (quoting McDuffy, 415 Mass. at 617). The court held, however, that children and their families cannot state a claim under the Education Clause absent an allegation of an "'egregious, Statewide abandonment of the constitutional duty.'" ADD46 (quoting Hancock, 443 Mass. at 433 (plurality opinion)).

Despite Plaintiffs' allegations concerning the substantial deficiencies in the schools they attend, the Superior Court characterized the "constitutional violation alleged by Plaintiffs" not as the denial of an adequate education, but as "denial of access to a particular type of school providing a particular type of education." ADD48. Based on this reframing of the complaint, the court concluded that Plaintiffs' claim does not require judicial intervention. Id. The court reasoned that, McDuffy's holding notwithstanding, "[t]his decision -- how to allocate public education choices among the multitude of possible types -– is best left to those elected to make those choices." ADD47.

3. The Superior Court Held That Plaintiffs Had Failed To State A Claim Under Equal Protection Principles

The Superior Court also dismissed Plaintiffs' equal protection claim. Beginning with the standard of review, the court held that, despite its

enshrinement in the Commonwealth's Constitution, education is not a fundamental right, and so the charter cap need only pass rational basis review to survive. ADD49-50. To reach this conclusion, the court relied primarily on Doe v. Superintendent of Schools of Worcester, 421 Mass. 117 (1995), in which this Court chose rational basis as the appropriate standard for reviewing a school district's decision to expel a student for bringing a knife to school. ADD49-50; ADD50 (n.14).

The Superior Court concluded that Plaintiffs could not establish that the charter cap is irrational because "the Legislature's charter school cap reflects an effort to allocate education funding between and among all the Commonwealth's students." ADD50. Indeed, the court reasoned that the rationality of the cap is so self-evident that "even supplemented by discovery[,] Plaintiffs will be unable to establish that the charter school cap is not rationally related to the furtherance of a legitimate State interest in providing public education to every child of this Commonwealth." ADD51.

IV. STATEMENT OF POINTS FOR WHICH DIRECT APPELLATE REVIEW IS SOUGHT

Plaintiffs seek Direct Appellate Review on the following two issues which were properly raised and preserved in the Superior Court:

1. Whether the Superior Court committed legal error by dismissing Plaintiffs' Education Clause claim on the ground that Plaintiffs failed to allege an "egregious Statewide abandonment" of the Commonwealth's constitutional duty to provide an adequate education.

2. Whether the Superior Court committed legal error by holding that a student's right to an adequate education is not a "fundamental right" and that Plaintiffs had failed to state an Equal Protection claim.

V. ARGUMENT

A. The Court Should Review The Superior Court's Incorrect Ruling That Plaintiffs Failed To Allege An Education Clause Violation

The Superior Court erred by concluding that the Commonwealth satisfies its obligation under the Education Clause so long as it has not committed an "egregious, Statewide abandonment of the constitutional duty" to provide an adequate education. ADD46. That language was mere dicta from the Hancock plurality opinion. As this Court explained in McDuffy, the Massachusetts Constitution requires substantially more: the Commonwealth must "provide an education for all its children, rich and poor, in every city and town of the Commonwealth." McDuffy, 415 Mass. at 606 (emphasis in original). This is an affirmative obligation owed to every student in the

Commonwealth. It is not satisfied where the political branches design a system that works for some students in some towns -- or even most students in most towns -- but allows persistent inequities to remain.

By replacing the affirmative obligation announced in McDuffy with dicta from Hancock, the Superior Court radically re-configured the rights that flow from the Education Clause. McDuffy and Hancock are clear that the Education Clause imposes a positive obligation on the Commonwealth to provide an adequate education to all children. See McDuffy, 415 Mass. at 618 ("The crux of the Commonwealth's duty lies in its obligation to educate all of its children."); Hancock, 443 Mass. at 430 (plurality opinion) (The "Commonwealth has a constitutional duty to prepare all of its children 'to participate as free citizens of a free State to meet the needs and interests of a republican government ....' Today, I reaffirm that constitutional imperative."). The Superior Court's purported "Statewide abandonment" standard inverts the promises made in McDuffy and would allow the Commonwealth to disregard its Education Clause obligations. The positive obligation to "educate all" would effectively be converted into a negative obligation that is satisfied so long as the state has "not abandoned all" of its children.

Nothing in Hancock warrants diminishing the

Education Clause in this way. To be sure, the Hancock plurality observed that the facts before it did not evidence the same sort of "egregious, Statewide abandonment" of the duty to educate present in McDuffy. Id. at 433. But that statement was not a holding that "Statewide abandonment" is the governing standard for Education Clause claims. How could it, when McDuffy itself examined only a few comparator school districts, not every school district, and did not find that every district had been "abandoned"? What is more, the plurality in Hancock took pains to caution against subsequent interpretations that would water down the obligations imposed by the Education Clause -- warning that its opinion should not be read as a "retreat from the court's holding in McDuffy," or as an effort to "insulate the Commonwealth" from future Education Clause challenges. Id. at 434. Left uncorrected, the Superior Court's decision, which also ignored Hancock's warning against arbitrary educational policies, would do just that.

The allegations set forth in Plaintiffs' complaint demonstrate severe and egregious deficiencies in the educational opportunities provided to Plaintiffs and thousands of similarly-situated students. When considered against the appropriate legal standard, they clearly are sufficient to state a claim. As Plaintiffs alleged, each was assigned to a

school that is chronically underperforming and for years has failed to provide students with an adequate education. ADD66-68 (¶¶ 49, 52, 56, 60, 64). The schools to which the Plaintiffs were assigned consistently fail to prepare a majority of their students to achieve basic levels of proficiency in reading, math, and science. See id. Indeed, in each of these schools, most students have not achieved proficiency in any tested subject in any of the last five years. Id. Plaintiffs supplemented these school-specific allegations with descriptions of systemic shortcomings affecting large numbers of students. ADD55 (¶ 5); ADD60 (¶¶ 20, 21); ADD64-65 (¶¶ 36, 40-44); ADD75 (¶¶ 90-91).

The facts alleged by the Plaintiffs mirror those which this Court held to constitute an Education Clause violation in McDuffy. As here, at the time that the McDuffy case was brought, many school districts were providing excellent educations. See McDuffy, 415 Mass. at 552 (discussing educational outcomes in communities like Brookline, Concord, and Wellesley). In McDuffy, it was sufficient for Plaintiffs to "focus mainly on four" sample districts to support their generalized allegations of systemic inadequacy. Id. at 552-554. Plaintiffs took the same approach here with respect to schools within Boston.

The facts alleged in the complaint, backed by

objective testing data, sufficiently suggest that the inadequacy identified by Plaintiffs is symptomatic of more widespread problems that have persisted for decades despite prior legislative efforts at reform. To a significant degree, the Superior Court's conclusion to the contrary was based on the incorrect supposition that Plaintiffs alleged that a school's designation (as a Level 3, 4, or 5 school) is dispositive of constitutional inadequacy. ADD47. Plaintiffs made no such argument. Rather, Plaintiffs' allegations that a disproportionate number of Boston schools have been classified as low performing -- and often remain so years later -- makes it plausible to infer that Plaintiffs' schools are not outliers and that the problems they are experiencing are not isolated. ADD65 (¶¶ 42-44). Indeed, there are thousands of students, who, like Plaintiffs, have sought to exit their assigned district schools and enroll in a charter school in hopes of obtaining a better education. ADD56 (¶ 8). Plaintiffs attend schools that consistently have failed to educate even a majority of their students to achieve proficiency in the basic subjects of mathematics, English, and science. ADD66-68 (¶¶ 49, 52, 56, 60, 64). The fact that these Boston schools are consistently ranked as some of the Commonwealth's worst simply bolsters Plaintiffs' allegations of inadequacy.

Despite these deficiencies, the Commonwealth has erected an arbitrary and irrational barrier that prevents the Plaintiffs from accessing a quality education –- specifically, the cap on attendance at charter schools that would provide Plaintiffs an adequate education. ADD74 (¶ 86). The Superior Court characterized Plaintiffs as suggesting that the "Commonwealth is obliged to provide more of one flavor of education than another." ADD47. This misconstrues the complaint. Twenty years after McDuffy and ten years after Hancock, Plaintiffs' claim is much starker. They seek access to an adequate education, rather than consignment to an inadequate one. The fact that students are forced to remain in chronically under-performing schools when, but for the cap, adequate charter schools would expand to accommodate them, is evidence that the Commonwealth is "acting in an arbitrary, nonresponsive, or irrational way." Hancock, 443 Mass. at 435.

B. The Court Should Review The Superior Court's Incorrect Rulings That There Is No "Fundamental Right" To An Education Under The Massachusetts Constitution And That Plaintiffs Have Failed To State An Equal Protection Claim.

The Superior Court also erred by holding that the right to an adequate education is not a fundamental right triggering strict scrutiny analysis. Fundamental rights "generally are those that stem

explicitly from or are implicitly guaranteed by the Constitution," LaCava v. Lucander, 58 Mass. App. Ct. 527, 533 (2003), and include rights that are "deeply rooted" in the Commonwealth's "history and tradition," Gillespie v. City of Northampton, 460 Mass. 148, 153 (2011) (quotation marks omitted). The right to an adequate education meets these criteria. See McDuffy, 415 Mass. at 565 ("the framers" of the Massachusetts Constitution "conceived of education as fundamentally related to the very existence of government").

The Superior Court's incorrect conclusion to the contrary is based on its misreading of Doe v. Superintendent of Schools of Worcester, 421 Mass. 117 (1995). In that case, which involved the expulsion of a single student, this Court expressed concern that "strict scrutiny analysis" would be triggered whenever "school officials determine, in the interest of safety, that a student's misconduct warrants expulsion." Id. at 130. But Doe involved the question of whether and when "educational opportunities can be lost by students as a result of their actions." Id. at 130-131. It does not control a case like this one where the Plaintiffs have been denied adequate educational opportunities by accident of birth.

To extract from the narrow circumstances of Doe -- a student being expelled after bringing a knife

to school -- a broad rule foreclosing the possibility of education claims being treated as fundamental rights claims in any Education Clause claim is error. Rather than allowing this overreading of Doe to stand, the Court should take this opportunity to clarify Doe's reach and hold that a student's right to an adequate education is a "fundamental right" that triggers strict scrutiny analysis -- a result commensurate with that right's enshrinement in the Commonwealth's Constitution.

Under strict scrutiny, the Commonwealth has the burden to show that its law is narrowly tailored to achieve a compelling government interest. See Gillespie, 460 Mass. 148, 153 (2011). The charter cap fails this test. Plaintiffs' complaint alleges that the charter cap creates and perpetuates a two-tiered education system in the Commonwealth. In many (mostly wealthier) districts, students are assured the opportunity to attend schools that provide a constitutionally adequate education. By contrast, in districts like Boston, many students' educational fates are left to chance, determined by a lottery.

The charter cap is a uniquely arbitrary and irrational law that fosters this inequality by keeping some of the best schools in Massachusetts from expanding to serve the needs of a population of students who would benefit most from attending them.

See ADD73 (¶ 82) ("Numerous studies confirm that the positive effect of public charter schools is most pronounced for students who attend urban and specifically Boston charter schools and for those students who begin with the lowest test scores.") (emphasis added). As such, it fails strict scrutiny.

Finally, even if rational basis review applies, the charter cap could survive only if "an impartial lawmaker could logically believe that the classification" at issue "would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Goodridge v. Department of Pub. Health, 440 Mass. 309, 330 (2003). The Superior Court incorrectly concluded that the charter school cap necessarily passes rational basis review, no matter what the evidence may show, because it "reflects an effort to allocate education funding between and among all the Commonwealth's students." ADD50. Even under rational basis review, Defendants' rationalization and justification for the law should not be accepted at face value, without any consideration of the evidence.

Rational basis review, while deferential, does not set the bar so low as to immunize government action from constitutional challenge so long as the government thinks up some reason to support the law, even one belied by the facts. See Goodridge, 440

Mass. at 330 & n.20 (observing that "[n]ot every asserted rational relationship is a 'conceivable' one" and collecting decisions in which the Supreme Judicial Court invalidated statutes under rational basis). This is especially true where litigants have not had the benefit of discovery. The question of how funding for charter schools affects traditional schools involves a highly factual inquiry that goes beyond the scope of notice pleading. Plaintiffs should be given the opportunity to test the Commonwealth's purported interest against the evidence.

VI. STATEMENT OF WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is warranted for three reasons.

First, the questions presented by the appeal are "questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court." Mass. R. A. P. 11(a). Whether the Education Clause and Equal Protection provisions prohibit the state from enacting policies that create an arbitrary barrier -- the charter cap -- to an adequate education that disproportionately affects students in certain districts is a novel question deserving of this Court's attention.

Second, the questions presented by the appeal are "questions of law concerning the Constitution of the Commonwealth ...." Mass. R. A. P. 11(a). Plaintiffs'

request for clarification of the Education Clause standard and of the "fundamental" nature of the right to an adequate education poses bedrock constitutional questions warranting this Court's review. See, e.g., Goodridge, 440 Mass. 309 (direct appellate review to resolve questions regarding application of due process and equal protection provisions of the Massachusetts Constitution); Adoption of Don, 435 Mass. 158 (2001) (direct appellate review to resolve question regarding application of Massachusetts Constitution's confrontation clause in custody proceedings); Commonwealth v. Weston W., 455 Mass. 24 (2009)(direct appellate review to address existence of a fundamental right to free movement under the Massachusetts Constitution); Doe v. Acton-Boxborough Regional School District, 468 Mass. 64 (2014) (direct appellate review to address whether recitation of pledge of allegiance in schools violates equal protection principles of the Massachusetts Constitution).

Third, the questions presented by the appeal are "questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." Mass. R. A. P. 11(a). The answers to the questions presented will have profound implications for all citizens of the Commonwealth -- and especially its children in the poorest and most disadvantaged school districts, and those trapped in

the most underperforming schools in those districts. Moreover, immediate review is imperative. Plaintiffs and children like them only have one opportunity to receive an adequate education -- an opportunity that that continues to slip away with each passing year they spend attending an inadequate school even as proven educational alternatives would be available to them but for the arbitrary charter cap.

VII. CONCLUSION

The application for direct appellate review should be granted.

January 17, 2017 Respectfully submitted,

JANE DOE NOS. 1-2 and JOHN DOE NOS. 1-3,

By their attorneys,

_/s/ William F. Lee_____
William F. Lee (BBO# 291960)
Felicia H. Ellsworth (BBO# 665232)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
william.lee@wilmerhale.com
felicia.ellsworth@wilmerhale.com

_/s/ Paul F. Ware _____
Paul F. Ware Jr. (BBO# 516240)
Kevin P. Martin (BBO# 655222)
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 02210
(617) 570-1000
pware@goodwinprocter.com
kmartin@goodwinprocter.com

_/s/ Michael B. Keating _____
Michael B. Keating (BBO# 263360)
Daniel L. McFadden (BBO# 676612)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
mkeating@foleyhoag.com
dmcfadden@foleyhoag.com

ADDENDUM

ADDENDUM

TAB 1

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

1584CV02788
Doe, Jane 2 et al vs. Peyser, Secy James A et al

CASE TYPE:	Equitable Remedies	**FILE DATE:**	09/15/2015
ACTION CODE:	D99	**CASE TRACK:**	F - Fast Track
DESCRIPTION:	Other Equity Action		
CASE DISPOSITION DATE	10/06/2016	**CASE STATUS:**	Closed
CASE DISPOSITION:	Disposed by Court Finding	**STATUS DATE:**	10/06/2016
CASE JUDGE:	Brieger, Heidi	**CASE SESSION:**	Civil F

LINKED CASE

PARTIES

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff
Doe, Jane 1

291960
William F Lee
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6000
Added Date: 10/04/2016

516240
Paul F Ware
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1000
Added Date: 10/04/2016

655222
Kevin Paul Martin
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1186
Added Date: 10/04/2016

665232
Felicia H. Ellsworth
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6687
Added Date: 10/04/2016

676612
Daniel Louis McFadden
Foley Hoag LLP
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600
Work Phone (617) 832-1293
Added Date: 10/04/2016

673785
Matthew Marshall Cregor
Lawyers' Committee for Civil Rights and Economic J
Lawyers' Committee for Civil Rights and Economic J
61 Batterymarch Street
5th Floor
Boston, MA 02110
Work Phone (617) 988-0609
Added Date: 10/04/2016

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff
Doe, Jane 2

Private Counsel **291960**
William F Lee
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6000
Added Date: 09/15/2015

Private Counsel **516240**
Paul F Ware
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1000
Added Date: 09/15/2015

Private Counsel **655222**
Kevin Paul Martin
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1186
Added Date: 09/15/2015

Private Counsel **263360**
Michael B Keating
Foley Hoag LLP
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
Work Phone (617) 832-1000
Added Date: 09/15/2015

665232
Felicia H. Ellsworth
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6687
Added Date: 09/28/2015

676612
Daniel Louis McFadden
Foley Hoag LLP
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600
Work Phone (617) 832-1293
Added Date: 11/17/2015

673785
Matthew Marshall Cregor
Lawyers' Committee for Civil Rights and
Economic J

	Lawyers' Committee for Civil Rights and Economic J 61 Batterymarch Street 5th Floor Boston, MA 02110 Work Phone (617) 988-0609 Added Date: 06/27/2016

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff
Doe, John 1

Private Counsel **291960**
William F Lee
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6000
Added Date: 09/15/2015

Private Counsel **516240**
Paul F Ware
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1000
Added Date: 09/15/2015

Private Counsel **655222**
Kevin Paul Martin
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1186
Added Date: 09/15/2015

Private Counsel **263360**
Michael B Keating
Foley Hoag LLP
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
Work Phone (617) 832-1000
Added Date: 09/15/2015

665232
Felicia H. Ellsworth
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6687
Added Date: 09/28/2015

676612
Daniel Louis McFadden
Foley Hoag LLP
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600
Work Phone (617) 832-1293
Added Date: 11/17/2015

673785
Matthew Marshall Cregor
Lawyers' Committee for Civil Rights and Economic J

	Lawyers' Committee for Civil Rights and Economic J 61 Batterymarch Street 5th Floor Boston, MA 02110 Work Phone (617) 988-0609 Added Date: 06/27/2016

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff	
Doe, John 2	**Private Counsel** 291960 William F Lee Wilmer Cutler Pickering Hale and Dorr LLP Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109 Work Phone (617) 526-6000 Added Date: 09/15/2015
	Private Counsel 516240 Paul F Ware Goodwin Procter LLP Goodwin Procter LLP 100 Northern Avenue Boston, MA 02210 Work Phone (617) 570-1000 Added Date: 09/15/2015
	Private Counsel 655222 Kevin Paul Martin Goodwin Procter LLP Goodwin Procter LLP 100 Northern Avenue Boston, MA 02210 Work Phone (617) 570-1186 Added Date: 09/15/2015
	Private Counsel 263360 Michael B Keating Foley Hoag LLP Foley Hoag LLP 155 Seaport Boulevard Boston, MA 02210 Work Phone (617) 832-1000 Added Date: 09/15/2015
	665232 Felicia H. Ellsworth Wilmer Cutler Pickering Hale and Dorr LLP Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109 Work Phone (617) 526-6687 Added Date: 09/28/2015
	676612 Daniel Louis McFadden Foley Hoag LLP Foley Hoag LLP Seaport West 155 Seaport Boulevard Boston, MA 02210-2600 Work Phone (617) 832-1293 Added Date: 11/17/2015
	673785 Matthew Marshall Cregor Lawyers' Committee for Civil Rights and Economic J

	Lawyers' Committee for Civil Rights and Economic J 61 Batterymarch Street 5th Floor Boston, MA 02110 Work Phone (617) 988-0609 Added Date: 06/27/2016

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Plaintiff
Doe, John 3

Private Counsel **291960**
William F Lee
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6000
Added Date: 09/15/2015

Private Counsel **516240**
Paul F Ware
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1000
Added Date: 09/15/2015

Private Counsel **655222**
Kevin Paul Martin
Goodwin Procter LLP
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210
Work Phone (617) 570-1186
Added Date: 09/15/2015

Private Counsel **263360**
Michael B Keating
Foley Hoag LLP
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210
Work Phone (617) 832-1000
Added Date: 09/15/2015

665232
Felicia H. Ellsworth
Wilmer Cutler Pickering Hale and Dorr LLP
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Work Phone (617) 526-6687
Added Date: 09/28/2015

676612
Daniel Louis McFadden
Foley Hoag LLP
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600
Work Phone (617) 832-1293
Added Date: 11/17/2015

673785
Matthew Marshall Cregor
Lawyers' Committee for Civil Rights and Economic J

	Lawyers' Committee for Civil Rights and Economic J 61 Batterymarch Street 5th Floor Boston, MA 02110 Work Phone (617) 988-0609 Added Date: 06/27/2016
Defendant Calderon-Rosado, Vanessa	
Defendant Mitchell D Chester (as substituted) Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education	
Defendant Chester, Commissioner Mitchell D	**564918** Juliana deHaan Rice Office of the Attorney General Office of the Attorney General One Ashburton Place Boston, MA 02108 Work Phone (617) 727-2200 Added Date: 11/18/2015 **663249** Robert E. Toone Office of the Attorney General Office of the Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2178 Added Date: 11/16/2015 **680194** Julia Kobick Office of the Massachusetts Attorney General Office of the Massachusetts Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2559 Added Date: 11/16/2015

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Craven, Katherine

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

Defendant
Doherty (as substituted), Edward

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Doherty, Ed

564918
Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249
Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194
Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

Defendant
Fryer (as substituted), Roland

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Fryer, Roland

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
McKenna, Margaret

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

Defendant
Moriarty (as substituted), Michael

Defendant
Morton (as substituted), James

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Morton, James O'S

564918
Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249
Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194
Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

Defendant
Noyce (as substituted), Pendred

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Noyce, Penny

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Peyser, Secy James A

453800

Alan H Shapiro
Sandulli Grace, P. C.
Sandulli Grace, P. C.
44 School Street
Suite 1100
Boston, MA 02108
Work Phone (617) 523-2500
Added Date: 05/12/2016

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

566769

John M Becker
Sandulli Grace, P. C.
Sandulli Grace, P. C.
44 School Street, Suite 1100
Boston, MA 02108
Work Phone (617) 523-2500
Added Date: 05/12/2016

546363

Ira Fader
Mass. Teachers Association
Mass. Teachers Association
2 Heritage Drive
Quincy, MA 02171-2119
Work Phone (617) 878-8245
Added Date: 05/12/2016

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant
Roach, David

Defendant
Sagan, Paul

564918

Juliana deHaan Rice
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Work Phone (617) 727-2200
Added Date: 11/18/2015

663249

Robert E. Toone
Office of the Attorney General
Office of the Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2178
Added Date: 11/16/2015

680194

Julia Kobick
Office of the Massachusetts Attorney General
Office of the Massachusetts Attorney General
One Ashburton Place
20th Floor
Boston, MA 02108
Work Phone (617) 963-2559
Added Date: 11/16/2015

RULE 3:03 SJC CERTIFIED

Elizabeth K Melcher
Massachusetts Bar

Added Date: 11/18/2015

Defendant Stewart, Mary Ann	**564918** Juliana deHaan Rice Office of the Attorney General Office of the Attorney General One Ashburton Place Boston, MA 02108 Work Phone (617) 727-2200 Added Date: 11/18/2015 **663249** Robert E. Toone Office of the Attorney General Office of the Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2178 Added Date: 11/16/2015 **680194** Julia Kobick Office of the Massachusetts Attorney General Office of the Massachusetts Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2559 Added Date: 11/16/2015
Defendant Willyard, Donald	**663249** Robert E. Toone Office of the Attorney General Office of the Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2178 Added Date: 11/16/2015 **680194** Julia Kobick Office of the Massachusetts Attorney General Office of the Massachusetts Attorney General One Ashburton Place 20th Floor Boston, MA 02108 Work Phone (617) 963-2559 Added Date: 11/16/2015

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant-Intervenor Ding, Samuel	**657470** Melissa Cook Allison Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6512 Added Date: 02/26/2016 **298740** Scott P Lewis Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6560 Added Date: 02/26/2016
Defendant-Intervenor H, N	
Defendant-Intervenor H, R	
Defendant-Intervenor K, T	
Defendant-Intervenor L, Z	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant-Intervenor New England Area Conference of the National Association for the Advancement of Colored People	**657470** Melissa Cook Allison Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6512 Added Date: 02/26/2016 **298740** Scott P Lewis Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6560 Added Date: 02/26/2016
Defendant-Intervenor Q, A	
Defendant-Intervenor Tapia, Savina	**657470** Melissa Cook Allison Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6512 Added Date: 02/26/2016 **298740** Scott P Lewis Massachusetts Bar Anderson & Kreiger LLP 50 Milk Street, 21st Floor Boston, MA 02109 Work Phone (617) 621-6560 Added Date: 02/26/2016

FINANCIAL DETAILS

0.00	0.00	0.00	0.00

No Financial Data for this report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
09/15/2015	1	Complaint	
09/15/2015		Origin 1, Type D99, Track F.	
09/15/2015	2	Civil action cover sheet filed (n/a)	
09/28/2015	3	Affidavit of Felicia H Ellsworth regarding service upon Atty General's Office	
09/28/2015	4	Service Returned for Defendant Peyser, Secy James A: Service via certified mail;	
09/28/2015		Appearance entered On this date Felicia H. Ellsworth, Esq. added for Plaintiff Jane 1 Doe	
09/28/2015		Appearance entered On this date Felicia H. Ellsworth, Esq. added for Plaintiff Jane 2 Doe	
09/28/2015		Appearance entered On this date Felicia H. Ellsworth, Esq. added for Plaintiff John 1 Doe	
09/28/2015		Appearance entered On this date Felicia H. Ellsworth, Esq. added for Plaintiff John 2 Doe	
09/28/2015		Appearance entered On this date Felicia H. Ellsworth, Esq. added for Plaintiff John 3 Doe	
10/15/2015	5	Plaintiff Jane 1 Doe's Joint Motion to extend time for Service and Filing of the Parties' Briefing on Defendants' Motion to Dismiss Applies To: Doe, Jane 1 (Plaintiff); Doe, Jane 2 (Plaintiff); Doe, John 1 (Plaintiff); Doe, John 2 (Plaintiff); Doe, John 3 (Plaintiff); Sagan, Paul (Defendant); Chester, Commissioner Mitchell D (Defendant); Calderon-Rosado, Vanessa (Defendant); Craven, Katherine (Defendant); Doherty, Ed (Defendant); McKenna, Margaret (Defendant); Morton, James O'S (Defendant); Noyce, Penny (Defendant); Roach, David (Defendant); Stewart, Mary Ann (Defendant); Willyard, Donald (Defendant)	
10/20/2015		Endorsement on Motion for (#5.0): ALLOWED Joint Motion without opposition Notice sent 10/21/15 Applies To: Doe, Jane 1 (Plaintiff)	Brieger
11/16/2015	6	General correspondence regarding a letter to the Honorable Heidi Brieger from the defts seeking leave to file a memorandum of law in excess of 20 pages filed & ALLOWED on 11/13/15. notices mailed 11/13/15	Brieger
11/16/2015		Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Secy James A Peyser	
11/16/2015		Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Paul Sagan	
11/16/2015		Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Commissioner Mitchell D Chester	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Katherine Craven
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Ed Doherty
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Margaret McKenna
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant James O'S Morton
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Penny Noyce
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Mary Ann Stewart
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Donald Willyard
11/16/2015	Appearance entered On this date Robert E. Toone, Jr., Esq. added for Defendant Roland Fryer
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Secy James A Peyser
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Paul Sagan
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Commissioner Mitchell D Chester
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Katherine Craven
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Ed Doherty
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Margaret McKenna
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11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Donald Willyard
11/16/2015	Appearance entered On this date Julia Kobick, Esq. added for Defendant Roland Fryer

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11/17/2015		Appearance entered On this date Daniel Louis McFadden, Esq. added for Plaintiff Jane Does 1-2 and John Does 1-3	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Secy James A Peyser	
11/18/2015		Appearance entered On this date Elizabeth K Melcher added for Defendant Paul Sagan	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Paul Sagan	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Commissioner Mitchell D Chester	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Katherine Craven	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Ed Doherty	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Roland Fryer	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Margaret McKenna	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant James O'S Morton	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Penny Noyce	
11/18/2015		Appearance entered On this date Juliana deHaan Rice, Esq. added for Defendant Mary Ann Stewart	
12/15/2015	7	Plaintiff Jane 1 Doe's Joint Motion to Amend the Caption: ALLOWED without opposition for the good and sufficient reason herein (dated 12/14/15) notice sent 12/14/15	Brieger
12/15/2015		Party status: Defendant Calderon-Rosado, Vanessa: Inactive;	
12/15/2015		Party status: Defendant Doherty, Ed: Inactive;	
12/15/2015		Party status: Defendant Chester, Commissioner Mitchell D: Inactive;	
01/15/2016	8	Plaintiff, Plaintiff in a Crossclaim Jane 2 Doe, John 1 Doe, John 2 Doe, John 3 Doe, Secy James A Peyser, Paul Sagan, Commissioner Mitchell D Chester, Katherine Craven, Ed Doherty, Roland Fryer, Margaret McKenna, Michael Moriarty (as substituted), James O'S Morton, Penny Noyce, Mary Ann Stewart, Donald Willyard's Joint Petition for for special assignment	

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01/15/2016	9	ORDER: Order for Special Assignment It is hereby ORDERED that the Honorable Heidi Brieger, Associate Justice of the Superior Court, is specially assigned to hear the above-captioned case for all purposes. The Cuvil Ckerl's Office will notify all counsel of record. (entered 1/13/16) notices mailed 1/14/16	Fabricant
02/02/2016	10	Plaintiff in a Crossclaim Secy James A Peyser 's Motion for leave to file reply ALLOWED without opposition Notice Sent 2/5/16 Applies To: Calderon-Rosado, Vanessa (Defendant)	Brieger
02/18/2016	11	Plaintiff in a Crossclaim Secy James A Peyser 's Motion to dismiss all counts pursuant to MRCP 12(b) (w/opposition) Applies To: Peyser, Secy James A (Defendant); Sagan, Paul (Defendant); Chester, Commissioner Mitchell D (Defendant); Craven, Katherine (Defendant); McKenna, Margaret (Defendant); Stewart, Mary Ann (Defendant); Willyard, Donald (Defendant); Fryer, Roland (Defendant); Fryer (as substituted), Roland (Defendant); Moriarty (as substituted), Michael (Defendant); Doherty (as substituted), Edward (Defendant); Noyce (as substituted), Pendred (Defendant); Morton (as substituted), James (Defendant)	
02/26/2016		Appearance entered On this date Melissa Cook Allison, Esq. added for Defendant-Intervenors Applies To: Tapia, Savina (Defendant-Intervenor); Ding, Samuel (Defendant-Intervenor); H, N (Defendant-Intervenor); L, Z (Defendant-Intervenor); Q, A (Defendant-Intervenor); K, T (Defendant-Intervenor); H, R (Defendant-Intervenor); New England Area Conference of the National Association for the Advancement of Colored People (Defendant-Intervenor)	
02/26/2016		Appearance entered On this date Scott P Lewis, Esq. added for Defendant-Intervenors Applies To: Tapia, Savina (Defendant-Intervenor); Ding, Samuel (Defendant-Intervenor); H, N (Defendant-Intervenor); L, Z (Defendant-Intervenor); Q, A (Defendant-Intervenor); K, T (Defendant-Intervenor); H, R (Defendant-Intervenor); New England Area Conference of the National Association for the Advancement of Colored People (Defendant-Intervenor)	
02/26/2016	12	Plaintiff in a 3rd Party Claim Savina Tapia 's Motion to intervene Applies To: Tapia, Savina (Defendant-Intervenor); Ding, Samuel (Defendant-Intervenor); H, N (Defendant-Intervenor); L, Z (Defendant-Intervenor); Q, A (Defendant-Intervenor); K, T (Defendant-Intervenor); H, R (Defendant-Intervenor); New England Area Conference of the National Association for the Advancement of Colored People (Defendant-Intervenor)	
03/16/2016		The following form was generated: Notice to Appear Sent On: 03/16/2016 11:42:39	

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04/08/2016		Matter taken under advisement The following event: Motion Hearing scheduled for 04/08/2016 02:00 PM has been resulted as follows: Result: Held - Under advisement	Brieger
04/26/2016		The following form was generated: Notice to Appear Sent On: 04/26/2016 09:30:52	
04/26/2016		The following form was generated: Notice to Appear Sent On: 04/26/2016 09:31:57	
04/26/2016		The following form was generated: Notice to Appear Sent On: 04/26/2016 09:32:53	
05/02/2016	13	MEMORANDUM & ORDER: On Proposed Defendant-Intevenors' Motion to Intervene: The court hereby ORDERS that the Proposed Defendant-Intervenors' Motion to Intervene is DENIED without Prejudice. The Movants are allowed to participate as Amici Curia. Any Supplemental Brief by amici shall be filed with the court at least 14 days prior to the hearing on Defendants' Motion to Dismiss (see P#13 for full order) (Dated 4/24/16) notice sent 4/29/16	Brieger
05/11/2016	14	Plaintiff in a Crossclaim Secy James A Peyser 's Motion for leave to file brief of Amicus Curiae Mass Teachers Association (w/o opposition)	
05/12/2016		Attorney appearance On this date Alan H Shapiro, Esq. added for Plaintiff Jane 1 Doe	
05/12/2016		Attorney appearance On this date Ira Fader, Esq. added for Plaintiff Jane 1 Doe	
05/12/2016		Attorney appearance On this date John M Becker, Esq. added for Plaintiff Jane 1 Doe	
05/12/2016		Attorney appearance On this date Ira Fader, Esq. added for Defendant Secy James A Peyser	
05/12/2016		Attorney appearance On this date Alan H Shapiro, Esq. added for Defendant Secy James A Peyser	
05/12/2016		Attorney appearance On this date John M Becker, Esq. added for Defendant Secy James A Peyser	
05/13/2016		Endorsement on Motion for (#14.0): ALLOWED lv to file Brief of Amicus Curiae Ntoice Sent 5/17/16	Brieger
05/13/2016	15	General correspondence regarding Brief of Amicus Curiae Mass Teachers Association	

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05/19/2016	16	Plaintiff John 1 Doe's Response to the Massachusetts Teachers Association 's motion for leave to file Brief of Amicus Curiae Applies To: Doe, Jane 2 (Plaintiff); Doe, John 1 (Plaintiff); Doe, John 2 (Plaintiff); Doe, John 3 (Plaintiff)	
06/23/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. dismissed/withdrawn for Plaintiff Jane 2 Doe	
06/24/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. added for Plaintiff Jane 2 Doe	
06/24/2016		Matter taken under advisement The following event: Rule 12 Hearing scheduled for 06/24/2016 02:00 PM has been resulted as follows: Result: Held - Under advisement	Brieger
06/27/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. added for Plaintiff Jane 2 Doe	
06/27/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. added for Plaintiff John 1 Doe	
06/27/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. added for Plaintiff John 2 Doe	
06/27/2016		Attorney appearance On this date Matthew Marshall Cregor, Esq. added for Plaintiff John 3 Doe	
07/01/2016	17	Plaintiff, Defendant Jane 2 Doe's Motion for order staying the deadlines for discovery and for motions under MRCK 56 Applies To: Doe, John 1 (Plaintiff); Doe, John 2 (Plaintiff); Doe, John 3 (Plaintiff); Peyser, Secy James A (Defendant); Sagan, Paul (Defendant); Craven, Katherine (Defendant); McKenna, Margaret (Defendant); Willyard, Donald (Defendant); Fryer, Roland (Defendant); Fryer (as substituted), Roland (Defendant); Noyce (as substituted), Pendred (Defendant); Morton (as substituted), James (Defendant); Mitchell D Chester (as substituted) Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education (Defendant); Ding, Samuel (Defendant-Intervenor); H, N (Defendant-Intervenor); L, Z (Defendant-Intervenor); Q, A (Defendant-Intervenor); K, T (Defendant-Intervenor); H, R (Defendant-Intervenor); New England Area Conference of the National Association for the Advancement of Colored People (Defendant-Intervenor)	
07/07/2016		Endorsement on Motion for order staying the deadlines for discovery and for motions under MRCP 56 (#17.0): ALLOWED w/o opposition for the good and suffecient reasons herein. (entered 7/6/16) notices mailed 7/7/16	Brieger
10/04/2016	18	MEMORANDUM & ORDER: on Defendants' Motion to Dismiss: It is hereby ORDERED that Defendants' Motion to Dismiss is ALLOWED (see P#18 for full decision and order) (dated 10/4/16) notice sent 10/4/16	Brieger

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10/04/2016	19	JUDGMENT on Defendants, Secy James A Peyser, Paul Sagan, Commissioner Mitchell D Chester, Vanessa Calderon-Rosado, Katherine Craven, Ed Doherty 12(b) motion to dismiss against Plaintiff(s) Jane 1 Doe, Jane 2 Doe, John 1 Doe, John 2 Doe, John 3 Doe. It is ORDERED and ADJUDGED: The Defendants' Motion to Dismiss is ALLOWED. (See Memorandum of Decision and Order dated October 4, 2016) entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	Brieger
10/06/2016		Disposed for statistical purposes	
10/13/2016	20	Notice of appeal filed. Applies To: Doe, Jane 2 (Plaintiff); Doe, John 1 (Plaintiff); Doe, John 2 (Plaintiff); Doe, John 3 (Plaintiff); Doe, Jane 1 (Plaintiff)	
10/20/2016	21	Court received Certification of Compliance from Attorney Felicia Ellsworth: Pursuant to Rule 9(c)(2) of the Massachusetts Rules of Appellate Procedure, the Plaintiffs hereby certify that they have ordered the transcript of the lower court proceedings they deem necessary for determination of the appeal. related to appeal	
11/15/2016	22	1 CD containing PDF Transcript of 6/24/16 received from approved court transcriber Wendy Ferrelli	
12/14/2016		Notice of assembly of record on Appeal	

I HEREBY ATTEST AND CERTIFY ON
Jan. 4, 2017
, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: Margaret M. Sellon
Asst. Clerk

TAB 2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015-2788-F

JANE DOE NOS. 1-2 and JOHN DOE NOS. 1-3

vs.

JAMES A. PEYSER, as Secretary of Education & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiffs in this matter are five school-aged children (the "Plaintiffs") alleging they have been denied their constitutional right to an "adequate" public education because of a cap limiting the number of charter schools in Massachusetts and a cap limiting the amount of funding that can be allocated to those charter schools. See G. L. c. 71, § 89(i). The instant action against certain Massachusetts education officials arises from alleged violations of the education clause of the Massachusetts Constitution (Count I) and constitutional provisions guaranteeing equal protection (Count II).[2] The matter is before the court on Defendants' Motion to Dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6).[3] After a hearing and careful review of the

[1] Paul Sagan, as Chair of the Board of Elementary and Secondary Education, Mitchell D. Chester, as Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education, and Katherine Craven, Edward Doherty, Roland Fryer, Margaret McKenna, Michael Moriarty, James Morton, Pendred Noyce, Mary Ann Stewart, and Donald Willyard, as Members of the Board of Elementary and Secondary Education.

[2] Plaintiffs' complaint contains references to due process. Plaintiffs have since clarified that Count II is premised on equal protection, not due process, principles.

[3] The court acknowledges the *amici curiae* brief filed on behalf of seven public school students, by the New England Area Conference of the National Association for the Advancement of Colored People ("N.A.A.C.P.") and the Boston Branch of the N.A.A.C.P. In February 2016, these participants requested to intervene in the litigation. On April 25, 2016, the court denied the request to intervene, but permitted the proposed intervenors to submit briefs and participate in all

parties' written submissions, and for the following reasons, Defendants' Motion to Dismiss is **ALLOWED**.

BACKGROUND

In 1993, the Supreme Judicial Court ("SJC") held that the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to provide education in the public schools for the children there enrolled, "whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live." McDuffy v. Secretary of the Exec. Office of Educ., 415 Mass. 545, 621 (1993). The SJC declared that the Commonwealth was not currently fulfilling its constitutional duty in that regard. Id. Immediately following the McDuffy decision, the Legislature enacted the Education Reform Act ("Act"). See St. 1993, c. 71. The purpose of the Act is to:

> provide a public education system of sufficient quality to extend to all children ... the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy. It is therefore the intent of this title to ensure: (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement.

G. L. c. 69, § 1. The Act:

> radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth's mandatory financial assistance to public schools. The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.

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hearings. The court also acknowledges the *amici curiae* brief filed by the Massachusetts Teachers Association.

Hancock v. Commissioner of Educ., 443 Mass. 428, 432 (2005) (Marshall, C.J., concurring); see Student No. 9 v. Board of Educ., 440 Mass. 752, 756 (2004), citing G. L. c. 69, § 1I, first, second, and third pars., inserted by St. 1993, c. 71, § 29 (Act imposed obligation to create objective "assessments" to measure both school and student performance).

Regarding assessments for students, the Act specifically required that every senior graduating from a school that accepts funds from the Commonwealth attain competency in the core subjects of mathematics, science and technology, history and social science, foreign languages, and English language arts, as measured by the student's score on the Massachusetts Comprehensive Assessment System examination ("MCAS examination"). Hancock, 443 Mass. at 439 (Marshall, C.J., concurring), citing G. L. c. 69, § 1D; 603 Code Mass. Regs. § 30.03.

Regarding assessments for schools, the Department of Elementary and Secondary Education ("Department") can, on the basis of student performance data, categorize schools as underperforming or chronically underperforming. G. L. c. 69, § 1J(a). In this respect, the Department has implemented a five-level system for district and school accountability. 603 Code Mass. Regs. § 2.03(1). The priority for assistance to a school and the degree of intervention by a school's district and the Department increases from Level 1 to Level 5, "as the severity and duration of identified problems increase." 603 Code Mass. Regs. § 2.03(1).

Under this five-level framework, the Department can designate the lowest-performing 20% of local schools, as measured by student performance data, as Level 3 schools. 603 Code Mass. Regs. § 2.04(2). The Department can also reclassify some of the Level 3 schools as Level 4 "underperforming" schools by considering other factors such as student attendance and rates of dismissal, suspension, exclusion, and promotion. G. L. c. 69, § 1J(a); 603 Code Mass. Regs. §

2.05(2). The superintendent of a district with a Level 4 school must prepare a "turnaround plan" for that school; the plan is subject to approval by the Department. G. L. c. 69, § 1J(b); 603 Code Mass. Regs. § 2.05(5). A turnaround plan may include changes to the curriculum, funding, length of school day or year, personnel, and collective bargaining agreements. G. L. c. 69, § 1J(d). A Level 4 school that fails to show significant improvement after implementation of the turnaround plan may be designated as a "chronically underperforming," or "Level 5" school. G. L. c. 69, § 1J(a); 603 Code Mass. Regs. § 2.06(2)(a). In that case, the Department – rather than the superintendent – prepares a turnaround plan that could include changes to the collective bargaining agreements or the appointment of a receiver. G. L. c. 69, § 1J(m), (o), (r).[4]

At issue in this case are portions of the Act governing charter schools. See G. L. c. 71, § 89(i).[5] There are two types of charter schools: Horace Mann charter schools and Commonwealth

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[4] Similar procedures are available for underperforming school districts. See G. L. c. 69, § 1K; 603 Code Mass. Regs. §§ 2.05(1), 2.06(1).

[5] General Laws c. 71, § 89(i) states fully:

> (1) Not more than 120 charter schools shall be allowed to operate in the commonwealth at any time, excluding those approved pursuant to paragraph (3); provided, however, that of the 120 charter schools, not more than 48 shall be Horace Mann charter schools; provided, however, notwithstanding subsection (c) the 14 new Horace Mann charter schools shall not be subject to the requirement of an agreement with the local collective bargaining unit prior to board approval; provided, further, that after the charter for these 14 new Horace Mann charter schools have been granted by the board, the schools shall develop a memorandum of understanding with the school committee and the local union regarding any waivers to applicable collective bargaining agreements; provided, further, that if an agreement is not reached on the memorandum of understanding at least 30 days before the scheduled opening of the school, the charter school shall operate under the terms of its charter until an agreement is reached; provided, further, that not less 4 of the new Horace Mann charter schools shall be located in a municipality with more than 500,000 residents; and not more than 72 shall be commonwealth charter schools. The board shall not approve a new commonwealth charter school in any community with a population of less than 30,000 as determined by the most recent United States Census

estimate, unless it is a regional charter school.

Applications to establish a charter school shall be submitted to the board annually by November 15. The board shall review the applications and grant new charters in February of the following year.

(2) In any fiscal year, no public school district's total charter school tuition payment to commonwealth charter schools shall exceed 9 per cent of the district's net school spending; provided, however, that a public school district's total charter tuition payment to commonwealth charter schools shall not exceed 18 per cent of the district's net school spending if the school district qualifies under paragraph (3). The commonwealth shall incur charter school tuition payments for siblings attending commonwealth charter schools to the extent that their attendance would otherwise cause the school district's charter school tuition payments to exceed 9 per cent of the school district's net school spending or 18 per cent for those districts that qualify under said paragraph (3).

Not less than 2 of the new commonwealth charters approved by the board in any year shall be granted for charter schools located in districts where overall student performance on the statewide assessment system approved by the board under section 1I of chapter 69 is in the lowest 10 per cent statewide in the 2 years preceding the charter application.

In any fiscal year, the board shall approve only 1 regional charter school application of any commonwealth charter school located in a school district where overall student performance on the statewide assessment system is in the top 10 per cent in the year preceding charter application. The board may give priority to applicants that have demonstrated broad community support, an innovative educational plan, a demonstrated commitment to assisting the district in which it is located in bringing about educational change and a record of operating at least 1 school or similar program that demonstrates academic success and organizational viability and serves student populations similar to those the proposed school seeks to serve.

(3) In any fiscal year, if the board determines based on student performance data collected pursuant to section 1I, said district is in the lowest 10 per cent of all statewide student performance scores released in the 2 consecutive school years before the date the charter school application is submitted, the school district's total charter school tuition payment to commonwealth charter schools may exceed 9 per cent of the district's net school spending but shall not exceed 18 per cent. For a district qualifying under this paragraph whose charter school tuition payments exceed 9 per cent of the school district's net school spending, the board shall only approve an application for the establishment of a commonwealth charter school if an applicant, or a provider with which an applicant proposes to contract, has a record of operating at least 1 school or similar program that demonstrates academic success and organizational viability and serves student

populations similar to those the proposed school seeks to serve, from the following categories of students, those: (i) eligible for free lunch; (ii) eligible for reduced price lunch; (iii) that require special education; (iv) limited English-proficient of similar language proficiency level as measured by the Massachusetts English Proficiency Assessment examination; (v) sub-proficient, which shall mean students who have scored in the 'needs improvement', 'warning' or 'failing' categories on the mathematics or English language arts exams of the Massachusetts Comprehensive Assessment System for 2 of the past 3 years or as defined by the department using a similar measurement; (vi) who are designated as at risk of dropping out of school based on predictors determined by the department; (vii) who have dropped out of school; or (viii) other at-risk students who should be targeted to eliminate achievement gaps among different groups of students. For a district approaching its net school spending cap, the board shall give preference to applications from providers building networks of schools in more than 1 municipality.

The recruitment and retention plan of charter schools approved under this paragraph shall, in addition to the requirements under subsections (e) and (f), include, but not limited to: (i) a detailed description of deliberate, specific strategies the charter school shall use to attract, enroll and retain a student population that, when compared to students in similar grades in schools from which the charter school shall enroll students, contains a comparable or greater percentage of special education students or students who are limited English-proficient of similar language proficiency as measured by the Massachusetts English Proficiency Assessment examination and 2 or more of the following categories: students eligible for free lunch; (ii) students eligible for reduced price lunch; students who are sub-proficient, those students who have scored in the 'needs improvement', 'warning' or 'failing' categories on the mathematics or English language arts exams of the Massachusetts Comprehensive Assessment System for 2 of the past 3 years or as defined by the department using a similar measurement; (iii) students who are determined to be at risk of dropping out of school based on predictors determined by the department; (iv) students who have dropped out of school; or (v) other at-risk students who should be targeted in order to eliminate achievement gaps among different groups of students. A charter school approved under this section shall supply a mailing in the most prevalent languages of the district the charter is authorized to serve to a third party mail house and pay for it to be copied and mailed to eligible students. If a school is or shall be located in a district with 10 per cent or more of limited English-proficient students, the recruitment strategies shall include a variety of outreach efforts in the most prevalent languages of the district. The recruitment and retention plan shall be updated each year to account for changes in both district and charter school enrollment.

If a district is no longer in the lowest 10 per cent, the net school spending cap shall be 9 per cent, unless the district net school spending was above 9 per cent in the year prior to moving out of the lowest 10 per cent in which case the net school spending cap shall remain at the higher level plus enrollment previous approved by the board. The

charter schools. G. L. c. 71, § 89(a), (c); 603 Code Mass. Regs. § 1.02. Both types are public schools that are managed by a board of trustees and function independently of the local school committee for the district in which the school is geographically located. See G. L. c. 71, § 89(c). Employees of Horace Mann and Commonwealth charter schools may organize for collective bargaining purposes. G. L. c. 71, § 89(y).

There is one type of Commonwealth charter school. G. L. c. 71, § 89(c). There are three types of Horace Mann charter schools. A Horace Mann I school is a new school requiring approval by the local school committee and the local collective bargaining unit. G. L. c. 71, § 89(c); 603 Code Mass. Regs. § 1.04(1)(a). A Horace Mann II school is a conversion of an existing public school requiring approval by the local school committee and a majority of the school faculty, but not the local collective bargaining unit. G. L. c. 71, § 89(c); 603 Code Mass. Regs. § 1.04(1)(a). A Horace Mann III school is a new school requiring approval by the local school committee, but not the local collective bargaining unit. G. L. c. 71, § 89(c); 603 Code Mass. Regs. § 1.04(1)(a).

Horace Mann charter schools are funded by the school districts in which they are located. G. L. c. 71, § 89(w); 603 Code Mass. Regs. § 1.07(1). Horace Mann charter schools receive

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> department shall determine and make available to the public a list of the school districts in said lowest 10 per cent.
>
> (4) Notwithstanding any general or special law to the contrary, if a district qualifying under paragraph (3) is no longer in the lowest 10 per cent, the net school spending cap shall be 9 per cent; provided, however, that if the board of elementary and secondary education previously approved a higher level of enrollment for a charter school in the district while the district was in the lowest 10 per cent, the net school spending cap shall remain at the level necessary to support such enrollment. This paragraph shall apply only to charter school enrollments approved before July 1, 2014.

funding directly in a lump sum appropriated by the school committee. G. L. c. 71, § 89(w). Commonwealth charter schools are funded by the local school districts from which they draw their students. G. L. c. 71, § 89(ff); 603 Code Mass. Regs. § 1.07(2). For Commonwealth charter schools, the Department calculates tuition payments for each student that a district sends to a Commonwealth charter school. G. L. c. 71, § 89(ff). "Tuition amounts for each sending district shall be calculated by the department using the formula set forth herein, to reflect, as much as practicable, the actual per pupil spending amount that would be expended in the district if the students attended the district schools." G. L. c. 71, § 89(ff). The State Treasurer pays that per student tuition figure directly to the Commonwealth charter school, and then reduces payment to the district sending that student by the same amount. G. L. c. 71, § 89(ff); 603 Code Mass. Regs. § 1.07(2)(d).[6]

Currently, no more than 120 Commonwealth charter schools and Horace Mann I and III charter schools may be in operation in the Commonwealth at a given time (known as the "numerical cap"). G. L. c. 71, § 89(i)(1). Of these 120 schools, up to 48 may be Horace Mann I and III charter schools, and up to 72 may be Commonwealth charter schools. G. L. c. 71, § 89(i)(1). There is no limit on the number of public schools that may be converted to Horace Mann II charter schools. G. L. c. 71, § 89(c) (stating that Horace Mann charter schools that are conversions of existing public schools (that is, Horace Mann II charter schools) shall not be subject to G. L. c. 71, § 89(i)(1)). In other words, there is no limit on the number of Horace

[6] In a district where the total charter school tuition amount is greater than the district's total charter school tuition amount for the previous year, the Commonwealth reimburses that district, subject to appropriation, in an amount "equal to 100 per cent of the increase in the year in which the increase occurs and 25 per cent in the second, third, fourth, fifth and sixth years following." G. L. c. 71, § 89(gg).

Mann II charter schools because they are not counted towards the 120-school numerical cap.

In addition to the numerical cap, G. L. c. 71, § 89 limits funding that may be allocated from school districts to Commonwealth charter schools (known as the "funding cap"). G. L. c. 71, § 89(i)(2), (3). Specifically, no more than 9% of a district's net school spending may be directed toward Commonwealth charter schools in the form of tuition payments for students leaving a district school to attend a Commonwealth charter school. G. L. c. 71, § 89(i)(2). The funding cap does not apply to Horace Mann charter schools, see G. L. c. 71, § 89(i)(2) (funding cap by its terms applies only to Commonwealth charter schools), meaning that no funding allocated to any Horace Mann charter school is counted towards the funding cap.

In 2010, the Act was amended so that if a school district is among the worst-performing 10% of school districts in the state (as determined by student performance data collected pursuant to G. L. c. 69, § 1I), the percentage of its funding that could be allocated to Commonwealth charter schools was automatically increased to 12%, and would continue to increase by 1% each year up to a maximum of 18% in 2017. Mass. Stat. 2010, c. 12, §§ 7, 9; G. L. c. 71, § 89(i)(2), (3). The 2010 amendment also provided that Commonwealth charter schools in these low-performing districts would not count against the numerical cap. G. L. c. 71, § 89(i)(1), (3).[7]

There are no academic requirements for a student's admission to a charter school. G. L. c. 71, § 89(m). Students are not charged an application fee and there is no limit on the

[7] Plaintiffs point out that these schools remain subject to the 18% funding cap. The funding cap therefore "acts as a hard cap on the number of seats available in charter schools." Complaint, paragraph 89. That statement is correct only insofar as it refers to *Commonwealth* charter schools.

number of charter schools to which a student may apply. G. L. c. 71, § 89(m). Preference for enrollment in Commonwealth charter schools is given to residents of the municipality in which the school is located and to siblings of current students. G. L. c. 71, § 89(n); 603 Code Mass. Regs. § 1.05(6). Preference for enrollment in Horace Mann charter schools is given to students at the school before its conversion to a charter school and to their siblings, then to students in other public schools within the district, then to other students in the district. G. L. c. 71, § 89(n); 603 Code Mass. Regs. § 1.05(7). If the number of applicants to a charter school exceeds the number of available spots, a lottery is held for those spots. G. L. c. 71, § 89(n).

Plaintiffs in this case are five children who applied to attend "public" charter schools in Boston.[8] None of the Plaintiffs was admitted to attend a charter school and thus each was placed on a waiting list, and "assigned to a district school that fails to provide the adequate education that is mandated by the Massachusetts Constitution." Complaint, paragraph 11. According to Plaintiffs, the schools to which they were assigned have failed to teach a significant portion of students to be "proficient or higher" in the MCAS examination subjects. Further, these schools have been designated by the Commonwealth as Level 3 or Level 4 schools.[9] Plaintiffs further allege that "[b]y early 2013, virtually all of the new charter seats permitted under the 2010 amendment already had been allocated to public charter schools and Boston had effectively reached its cap. The Commonwealth has been required to reject applications to open [charter]

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[8] It is unclear from the record whether these schools were Commonwealth charter schools or Horace Mann charter schools. One student applied to attend the Edward Brooke East Boston Public Charter School, one applied to attend the Match Charter Public School, one applied to attend the Edward Brooke Roslindale Public Charter School, and two applied to "multiple public charter schools."

[9] The schools were not identified in the pleadings.

schools even if those applications have merit." Complaint, paragraph 92.[10]

In view of these allegations, Plaintiffs claim that G. L. c. 71, § 89(i) "arbitrarily and unconstitutionally deprives them and similarly-situated students of the opportunity to receive an adequate public education," Complaint, paragraph 12, because it caps the number of seats in charter schools both directly through the numerical cap and indirectly through the funding cap. See Complaint, paragraph 87 ("Massachusetts law caps both the total number of public charter schools in the Commonwealth and the percentage of any school district's total funding that may be paid to public charter schools."). Further, Plaintiffs claim the "charter school cap imposes an arbitrary limit on the growth of public charter schools which bears no relation to any legitimate education goal." Complaint, paragraph 103. Finally, according to Plaintiffs, the charter school cap and the resulting lottery admission system, "disproportionally impact children in less affluent school districts with failing schools." Complaint, paragraph 104.

Plaintiffs ask the court to declare that G. L. c. 71, § 89(i) is unconstitutional and enjoin its application so that more public charter schools can open to accept them and others similarly situated.

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[10] In support of this allegation, Plaintiffs introduced into evidence a Memorandum to the Members of the Board of Elementary and Secondary Education from Mitchell D. Chester ("Chester") dated February 12, 2016. See Exhibit 1. In that memorandum, addressing Commonwealth charter schools only, Chester stated that, "we have more high quality charter amendment requests for Boston from qualified applicants than we can accommodate under the statutory net school spending (NSS) cap" and that "a number of applications came from schools with track records of performance that, if more seats were available in Boston, have the potential to be strong candidates for my recommendation." Chester also advised that he anticipated no additional increases in enrollment in Commonwealth charter schools in Boston in future years under the current statute.

DISCUSSION

I. Subject Matter Jurisdiction – Mass. R. Civ. P. 12(b)(1)

A court may entertain a petition for declaratory relief only where an "actual controversy" sufficient to withstand a motion to dismiss appears in the pleadings. G. L. c. 231A, § 1. Declaratory judgment proceedings are concerned with the resolution of real, not hypothetical, controversies; any declaration issued is intended to have an immediate impact on the rights of the parties. Employers' Commercial Union Ins. Co. v. Commissioner of Ins., 362 Mass. 34, 38 (1972). The "actual controversy" requirement of G. L. c. 231A, § 1, is to be liberally construed, and a party seeking declaratory judgment need not demonstrate an actual impairment of rights. Boston v. Keene Corp., 406 Mass. 301, 304 (1989).

Plaintiffs ask the court to lift the statutory cap on "public charter schools" so that more charter schools can open, which, they contend, will result in an opportunity for them and others similarly situated to obtain a "constitutionally adequate education." The Attorney General argues that Plaintiffs have not presented an actual controversy because of the possibility that more Horace Mann II schools could open at any time as they are not subject to the numerical or funding cap. In addition, more Horace Mann I and III schools could open at any time because they are not subject to the funding cap.

Although Plaintiffs do not mention – not even once – Horace Mann schools in their complaint,[11] Plaintiffs argue, in their opposition to the motion to dismiss, that there is no

[11] Plaintiffs use the term "public charter schools" throughout the complaint, but it is clear from the context that this term refers only to Commonwealth charter schools. See Complaint, Paragraph 74 (alleging that there are 71 public charter schools in Commonwealth), and Paragraphs 87 and 88 (referring to percentage of funding that may be allocated to public charter schools).

evidence that Horace Mann charter schools are, "as a practical matter, actually available to address the constitutional violation identified" because Horace Mann charter schools "have failed to present a viable alternative for the plaintiffs to obtain an adequate education." Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, page 11. Plaintiffs argue further that "the theoretical availability of Horace Mann schools does not obviate the fact that the cap on Commonwealth charter schools, which is imposing not theoretical but real harm on Plaintiffs and the other class members, is unconstitutional ... ." Id. At the hearing, Plaintiffs reiterated these claims about Horace Mann charter schools and conceded that, by this complaint, they seek an expansion in the number of *Commonwealth* charter schools, not Horace Mann charter schools.

Functionally, the charter school cap does not apply to Horace Mann II schools as they are not subject to the numerical cap or the funding cap. In addition, the only "cap" on Horace Mann I and III schools is a numerical cap, and there is no dispute that the numerical cap has not been reached as to those schools. Plaintiffs have alleged no reason in their complaint why Horace Mann and Commonwealth charter schools should be treated differently in this lawsuit. They argue, however, in their motion papers and before the court, that more Horace Mann schools will not adequately address their constitutional concerns. The court will therefore treat Plaintiffs' complaint as requesting the court to lift the "cap" solely as it applies to Commonwealth charter schools.

The Attorney General argues that there is still no actual controversy because Massachusetts has not reached the numerical cap for Commonwealth charter schools in light of the fact that of the 71 Commonwealth charter schools operating now in Massachusetts, only 56 count toward the numerical cap. See G. L. c. 71, § 89(i)(1), (3) (providing that Commonwealth

charter schools in low-performing districts do not count against the numerical cap). The issue here though is that because all Commonwealth charter schools are subject to the funding cap, if the funding cap is reached for a school district such as Boston, then no more Commonwealth charter schools could open in Boston even if the numerical cap has not been reached.

The Attorney General also argues that Boston is not at the funding cap for Commonwealth charter schools because the funding cap can increase in 2017. A party may seek declaratory judgment, however, "either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen." See G. L. c. 231A, § 1. Plaintiffs allege that "[t]he funding increase allowed by the 2010 legislation has not come close to meeting demand for public charter school admission in Boston." Complaint, paragraph 91. Plaintiffs also allege that there are "thousands" of students who have been denied entry to public charter schools because "the demand for entrance to public charter schools [is] much higher than the supply of classroom seats." Complaint, paragraphs 7 and 8. It follows that a one to two percent increase in the 2017 funding cap will not significantly change the supply of – or demand for – charter school seats. The court thus concludes that even though Boston may not have technically reached the funding cap, Plaintiffs have shown that an actual controversy has arisen at this point insofar as the 2017 increase in funding to Commonwealth charter schools is unlikely to be sufficient to permit enrollment by the number of students who seek admission.

Plaintiffs must also demonstrate the requisite legal standing to secure a resolution of the actual controversy. Massachusetts Assoc. of Ind. Ins. Agents v. Commissioner of Ins., 373 Mass. 290, 292 (1977) (question whether actual controversy exists closely related to issue of standing). In declaratory judgment proceedings, standing requirements should be liberally construed. Home

Builders Assoc. of Cape Cod, Inc. v. Cape Cod Comm'n, 441 Mass. 724, 733 (2004). "Only one whose rights are impaired by a statute [, however,] can raise the question of its constitutionality, and he can object to the statute only as applied to him." Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 390 (1962); see Massachusetts Assoc. of Ind. Ins. Agents, 373 Mass. at 293 (1977) (party has standing when it can allege injury within area of concern of statute under which injurious action has occurred).

The purpose of the Act is to "provide a public education system of sufficient quality to extend to all children ... the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy." G. L. c. 69, § 1. Plaintiffs have adequately alleged that their rights have been impaired by the Act because they argue that § 89(i) impedes their ability to obtain a quality education. Accordingly, the court concludes that for the purposes of the relief sought herein, Plaintiffs have standing.

II. Failure to State a Claim – Mass. R. Civ. P. 12(b)(6)

Standing to raise a claim is a separate question, however, from whether there is in fact a claim to be raised. Careful scrutiny of the complaint shows that – as a legal matter – it fails to state a claim upon which relief can be granted. In order to withstand a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a plaintiff's complaint must contain factual "allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect [a] threshold requirement ... that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007) (internal quotations omitted). While a complaint need

not set forth detailed factual allegations, a plaintiff is required to present more than labels and conclusions, and must raise a right to relief "above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 127 S. Ct. at 1964-1965 (internal quotations omitted).

A. Count I - The Education Clause

Part II, c. 5, § 2, of the Massachusetts Constitution provides, in relevant part, that "it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish ... public schools and grammar schools in the towns."[12] This "education clause" of the Massachusetts Constitution, "impose[s] an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live." McDuffy, 415 Mass. at 621; see Hancock, 443 Mass. at 430-431 (Marshall, C.J., concurring). The SJC cautioned, however, that McDuffy "should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education." Doe v. Superintendent of Sch., 421 Mass. 117, 129 (1995) (stating that court acknowledged in McDuffy importance of education and decided that Commonwealth generally has obligation to educate its children); Sherman v. Charlestown, 8 Cush. 160, 163-164 (1851) (benefit of public education is common, not exclusive personal, right).

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[12] The Constitution uses the term "magistrates" to refer to officials of the executive branch. See McDuffy, 415 Mass. at 561 n.16.

While the education clause "mandates that the Governor and the Legislature have a plan to educate all public school children and provide the resources to establish and maintain that plan[,]" that clause leaves the details of education policymaking to the Governor and the Legislature. Hancock, 443 Mass. at 454 (Marshall, C.J., concurring), citing McDuffy, 415 Mass. at 610, 620, 621. This is because "[e]ach [policy] choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions." Hancock, 443 Mass. at 460 (Marshall, C.J., concurring).

The pleadings here, read in the context of case law, lead the court to conclude that Plaintiffs have not alleged the kind of "egregious, Statewide abandonment of the constitutional duty" necessary to show a violation of the education clause. See Hancock, 443 Mass. at 433 (Marshall, C.J., concurring). Plaintiffs allege that each attends a school that has been designated as a Level 3 or Level 4 school by the Commonwealth. Further, these schools fail to teach a significant number of its students to be "proficient or higher" in the MCAS examination subjects. Thus, Plaintiffs' claim each has been deprived of a constitutionally "adequate" education. Accepting Plaintiffs' allegations as true, however, does not mean that the court must find that because a school has been designated as a Level 3 or 4 school, and the students have low MCAS examination scores, that there has been the kind of "Statewide abandonment" demonstrating a constitutional violation. To the contrary, the Department classifies schools by level so that it can identify the schools most in need of assistance and then provide such schools with the ways and means to try to improve the school. See 603 Code Mass. Regs. § 2.01(2) ("603 CMR 2.00 governs the review of the educational programs and services provided by the Commonwealth's

public schools and the assistance to be provided by districts and the Department to improve them; it identifies the circumstances under which a school may be declared underperforming (placed in Level 4) and those under which a school or school district may be declared chronically underperforming (placed in Level 5), resulting in accountability and assistance ... ."). The Attorney General argues that a Level 4 designation is not an admission that the school or school district has abandoned its constitutional duty to provide an education to its students. The court agrees. The five-level regulatory framework is a policy-driven measurement tool designed to single out schools for extra scrutiny and improvement so as to ensure the Commonwealth is in fact fulfilling its constitutional mandate to provide "a public education system of sufficient quality." G. L. c. 69, § 1.

The education clause "obligates the Commonwealth to educate all its children." McDuffy, 415 Mass. at 617. This obligation does not mean that Plaintiffs have the constitutional right to choose a particular flavor of education, whether it be a trade school, a sports academy, an arts school, or a charter school. Even if the court were to deny the instant motion, thereby allowing substantial discovery to follow, Plaintiffs' action will always be addressed to the question of whether the Commonwealth is obliged to provide more of one flavor of education than another. This decision – how to allocate public education choices amongst the multitude of possible types – is best left to those elected to make those choices to be carried out by those educated and experienced to do so. See art. 30, Declaration of Rights ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them:

to the end it may be a government of laws and not of men."); Alliance v. Commonwealth, 427 Mass. 546, 548 (1998) (respect for separation of powers has led courts "to be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business"); see also Hancock, 443 Mass. at 460 (Marshall, C.J., concurring) (choices whether to provide free preschool for all "at risk" three- and four-year old children, remedial programs, nutrition and drug counseling programs, or programs to involve parents more directly in school affairs, all "embod[y] a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political").

The court concludes that the constitutional violation alleged by Plaintiffs here – denial of access to a particular type of school providing a particular type of education – is not of the sort of Statewide abandonment of duty addressed by the court in McDuffy, and therefore does not require the court to intervene and insert itself in the details of public education policymaking. See Hancock, 443 Mass. at 454 (Marshall, C.J., concurring).[13]

B. Count II - Equal Protection

The equal protection clause in the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This language mandates that "all persons similarly situated should be treated alike." Mancuso v. Mass. Interscholastic Ath. Ass'n, 453 Mass. 116, 129 (2009). Plaintiffs argue here that because they live in less affluent school districts, the charter school cap deprives them of an equal opportunity to receive an adequate education and arbitrarily subjects them – and similarly

[13] The court's conclusion does not, of course, foreclose Plaintiffs from addressing these issues and allegations to the electorate and the Executive.

situated children – to disparate treatment as compared to children who reside in more affluent school districts. Specifically, Plaintiffs argue that, in wealthier school districts, students are assured an opportunity to attend a public school providing an adequate education because all schools meet "constitutional standards." See Plaintiffs Brief in Opposition to Defendants' Motion to Dismiss, page 31. In less affluent school districts, not all public schools meet such standards and a student's access to many of the schools that do meet those standards is arbitrarily capped and randomly assigned by lottery.

To pass constitutional muster, "a classification involving a suspect group or a fundamental right must be supported by a compelling State interest. Cases not involving a suspect group or fundamental right need be supported only by a rational or conceivable basis." Lee v. Commissioner of Revenue, 395 Mass. 527, 529-530 (1985); see Goodridge v. Department of Pub. Health, 440 Mass. 309, 330 (2003) (with strict scrutiny, Commonwealth has burden to show that law is narrowly tailored to achieve compelling government interest). Classifications based on sex, race, color, creed or national origin are considered suspect. Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd., 416 Mass. 635, 640 (1993); see also art. 106 of the Amendments to the Massachusetts Constitution. Plaintiffs concede in their pleadings that the charter school cap does not implicate a suspect classification. See Plaintiffs Brief in Opposition to Defendants' Motion to Dismiss, page 33. Plaintiffs argue instead that the charter school cap implicates their fundamental right to an education under the Massachusetts Constitution. The SJC, however, has repeatedly declined to hold that a student's right to an education is a "fundamental right" triggering strict scrutiny analysis. Doe, 421 Mass. at 129 (agreeing that McDuffy should not be construed as holding that Massachusetts Constitution guarantees each

individual student the fundamental right to an education).[14]

In the absence of a suspect classification, the court's role is to determine whether the classification rationally "furthers a legitimate State interest." Johnson v. Martignetti, 374 Mass. 784, 791 (1978). "A classification will be considered rationally related to a legitimate purpose 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Massachusetts Fed. of Teachers v. Board of Edu., 436 Mass. 763, 777-778 (2002), quoting Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 429 Mass. 721, 723 (1999).

Both Commonwealth and Horace Mann charter schools are funded by the school districts from which they draw students or in which they are located. Consequently, public funding for charter schools necessarily affects the public funding of non-charter schools in the district. Defendants argue, and the court agrees, that the Legislature's charter school cap reflects an effort to allocate education funding between and among all the Commonwealth's students and therefore has a rational basis and cannot violate the equal protection clause. See Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quotation and citations omitted) ("In the area of economics and social

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[14] Plaintiffs correctly note that the full sentence from the Doe decision is:

> While the court acknowledged in McDuffy the importance of education and decided that the Commonwealth generally has an obligation to educate its children, the court did not hold, and we decline to hold today, that a student's right to an education is a 'fundamental right' which would trigger strict scrutiny analysis whenever school officials determine, in the interest of safety, that a student's misconduct warrants expulsion.

Doe, 421 Mass. at 129-130. Plaintiffs suggest that the SJC's holding does not apply in this case where the issue is whether Plaintiffs, who have done nothing to justify the loss of opportunities, have a fundamental right to access to an adequate education. The court disagrees. The SJC specifically stated that McDuffy did not hold that education is a fundamental right, see Doe, 421 Mass. at 129, and Plaintiffs have cited no other Massachusetts case holding otherwise.

welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."); see also San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) ("There is hardly a law on the books that does not affect some people differently from others."). The court concludes that – even supplemented by discovery – Plaintiffs will be unable to establish that the charter school cap is not rationally related to the furtherance of a legitimate State interest in providing public education to every child of this Commonwealth. See Massachusetts Fed. of Teachers, 436 Mass. at 779.

ORDER

For all of these reasons, it is hereby **ORDERED** that Defendants' Motion to Dismiss is **ALLOWED**.

Heidi E. Brieger
Associate Justice

Dated at Boston, Massachusetts, this 4th day of October, 2016.

TAB 3

NOTIFY

JUDGMENT ON MOTION TO DISMISS

Trial Court of Massachusetts
The Superior Court

Michael Joseph Donovan, Clerk of Court

DOCKET NUMBER
1584CV02788

CASE NAME
Jane 2 Doe et al
vs.
Secy James A Peyser et al

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Peyser, Secy James A
Sagan, Paul
Chester, Commissioner Mitchell D
Calderon-Rosado, Vanessa
Craven, Katherine
Doherty, Ed

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Doe, Jane 1
Doe, Jane 2
Doe, John 1
Doe, John 2
Doe, John 3

This action came on before the Court, Hon. Heidi Brieger, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),

It is **ORDERED AND ADJUDGED:**

The Defendants' Motion to Dismiss is ALLOWED. (See Memorandum of Decision and Order dated October 4, 2016)

Notice Sent 10/6/16 WFL
MMC PFW
AHS KPM
JDR MBK
JMB FHE
IT DLM
RET MCA
OK SPL

JUDGMENT ENTERED ON DOCKET 10/6 2016
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	~~CLERK OF COURT~~S/ ASST. CLERK
10/04/2016	X

Date/Time Printed: 10-04-2016 15:38:34

SCV083\ 03/2016

TAB 4

COPY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
C.A. No.

15-2788 F

JANE DOE NOS. 1-2 and JOHN DOE NOS. 1-3, Minor Children, Each by Their Parent and Next Friend,

Plaintiffs,

v.

JAMES A. PEYSER, as Secretary of Education; PAUL SAGAN, as Chair of the Board of Elementary and Secondary Education; MITCHELL D. CHESTER, as Commissioner of Elementary and Secondary Education and a Member of the Board of Elementary and Secondary Education; VANESSA CALDERON-ROSADO, KATHERINE CRAVEN, ED DOHERTY, MARGARET MCKENNA, JAMES O'S. MORTON, PENNY NOYCE, DAVID ROACH, MARY ANN STEWART, DONALD WILLYARD, as Members of the Board of Elementary and Secondary Education,

Defendants.

CLASS ACTION COMPLAINT

1. Every child in the Commonwealth shares the constitutional right to an adequate education. The plaintiffs in this lawsuit are children who, along with thousands of others like them throughout Boston, were assigned to schools that do not provide an education satisfying even that minimal constitutional standard. In an effort to obtain a quality education, each plaintiff applied this year to one or more proven, successful, public charter schools. An unconstitutional state law, however, caps the number of seats in public charter schools, dramatically and arbitrarily reducing each plaintiff's chances of gaining admission. None of the plaintiffs was lucky enough to win a spot. Some of the plaintiffs now attend the inadequate district schools to which they were assigned. The parents of others have taken the extraordinary step of removing their children from the public school system and paying financially crippling fees for their children to attend a private school. These children and families find themselves in this bleak situation through no fault of their own. Rather, they were forced into it by a system that, for decades, has been either unwilling or unable to bring all of its public schools into compliance with constitutional standards. As a result of that system, thousands of children have found their opportunities for a healthy, happy, and productive life permanently diminished. Through this lawsuit, plaintiffs seek to vindicate the right of all Boston's children to obtain an adequate public education, free from the arbitrary and unnecessary barrier posed by the charter school cap.

INTRODUCTION

2. More than 200 years ago, the framers of the Massachusetts Constitution, recognizing the importance of broadly shared educational opportunities to a fair and democratic society, wisely placed an obligation upon the government to "cherish" learning by providing public education to children throughout the Commonwealth. Mass. Const. Part II, c. 5, § 2. More than 20 years ago, the Supreme Judicial Court held in *McDuffy v. Secretary of Executive*

Office of Education, 415 Mass. 545, 606 (1993), that this clause, known as the Education Clause, imposes a judicially enforceable duty upon the Commonwealth "to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth."

3. When *McDuffy* was decided in 1993, the Commonwealth's political branches were failing to discharge their constitutional responsibility to provide an adequate education to all students in all school districts. As the Supreme Judicial Court wrote, although the Commonwealth's statutory scheme "purport[ed] to provide equal educational opportunity in the public schools for every child, rich or poor, the reality is that children in the less affluent communities ... are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution." 415 Mass. at 614.

4. The Commonwealth's political leaders initially responded to *McDuffy* by enacting the Massachusetts Education Reform Act of 1993, G.L. c. 69-71 (1993) ("the '93 Act"). That Act and subsequent legislative efforts produced some gains for some students. More than a decade ago, the Supreme Judicial Court rejected a challenge stemming from *McDuffy*, holding in *Hancock v. Commissioner of Education*, 443 Mass. 428, 453 (2005) that the Commonwealth was making adequate progress in addressing the deficiencies discussed in *McDuffy*.

5. At that time, perhaps it was reasonable for the judiciary to await further progress towards adequate enforcement of the Education Clause. But today, more than two decades since *McDuffy* and a decade since *Hancock*, gross deficiencies and inequities persist in the Commonwealth's educational system. A generation of children have passed through the public school system since *McDuffy*—yet many children in less affluent school districts, unlike their peers in more affluent districts, *still* attend district schools that do not provide a constitutionally adequate education.

6. Boston is one such district. Faced with the failure of the Commonwealth to live up to its constitutional obligation to provide them with an adequate education, the plaintiffs sought to avail themselves of the quality educational opportunities provided by the public charter schools in their district. These schools, first authorized under the '93 Act, serve the same predominantly minority, low-income demographic group that non-charter public schools too often fail. Years of rigorous studies have shown that these schools work: They enable low-income students to learn and excel and to achieve the same results as children in affluent suburban communities. Indeed, studies show that public charter schools are particularly beneficial for student populations that traditionally have struggled in district schools.

7. Despite the proven effectiveness of public charter schools, the plaintiffs found their chances of attending a public charter school greatly and unnecessarily diminished by a Massachusetts law that arbitrarily caps at 18% the percentage of a poor-performing school district's total funding that may be used for public charter schools. G.L. c. 71, § 89(i). This law artificially restricts capacity in charter schools, leaving the demand for entrance to public charter schools much higher than the supply of classroom seats.

8. Admission to oversubscribed public charter schools is determined by lottery. G.L. c. 71, § 89(n). In 2015, tens of thousands of children sought enrollment in public charter schools in Massachusetts. As a result of the cap, thousands of these students—including many thousands in Boston alone—were denied entry.

9. The effect of the cap and the lottery system is to provide a small number of lucky children living in poorer, urban school districts like Boston an escape route to receive an adequate education, while other similarly-situated children in those districts are relegated to

failing schools. Only miles away in wealthier school districts, in contrast, every child is able to attend an adequate (and often excellent) public school.

10. As *McDuffy* made clear, the Massachusetts Constitution does not allow the legislature to passively accept such disparities in educational opportunity. Much less can the legislature actively contribute to such disparities by arbitrarily and unreasonably capping enrollment in public charter schools and in so doing impose a barrier to access that is entirely "extrinsic to the educational mission." *Hancock*, 443 Mass. at 454.

11. The plaintiffs are five children who applied to attend public charter schools in Boston and were not among the lucky few who "won" the public charter lottery. Each of these children was assigned to a district school that fails to provide the adequate education that is mandated by the Massachusetts Constitution. These children now either attend the constitutionally inadequate school to which they were assigned or have taken extraordinary steps, at great expense, to obtain the adequate educational opportunity that the Commonwealth failed to provide them.

12. The plaintiffs allege that Massachusetts General Law, Chapter 71, Section 89(i) arbitrarily and unconstitutionally deprives them and similarly-situated students of the opportunity to receive an adequate public education. The plaintiffs seek a declaration that the cap on charter schools violates the Education Clause, as well as the Equal Protection, Due Process, and Liberty Clauses, of the Massachusetts Constitution.

13. The relief sought by these children is modest. They do not ask the court to direct their admission to any school; nor do they ask the courts to assume oversight of the failing schools to which they have been assigned. All these children ask is that the court remove an arbitrary impediment to their ability to obtain a quality education.

THE PARTIES

A. The Plaintiffs

14. The plaintiffs are residents of Boston, Massachusetts who have been assigned to attend district schools in the Boston Public School System. All of the plaintiffs applied to attend public charter schools, but each was denied a spot at a public charter school. Some now attend district schools where they are receiving a constitutionally inadequate education. One has incurred significant cost—in time, money, and energy—in order to obtain the quality education that the Commonwealth has failed to provide.

15. John Doe No. 1 is a 7 year-old boy of Hispanic descent who lives with his parents in South Boston. John Doe No. 1 applied to attend the Edward Brooke East Boston Public Charter School, but was denied a spot through the lottery. He presently attends second grade at a district school in Boston that fails to provide a constitutionally adequate education to its students. John Doe No. 1's family is so concerned about the inadequacy of the education he is receiving that they are considering moving out of Boston so that he can receive an adequate public school education.

16. Jane Doe No. 1 is a 6 year-old girl of Haitian descent who lives with her parents and younger sister in Dorchester. Jane Doe No. 1 applied to attend the Match Charter Public School, but was denied a spot through the lottery. She presently attends first grade at a district school in Boston that fails to provide a constitutionally adequate education to its students. Hoping to obtain a better education for her daughter, Jane Doe No. 1's mother plans to enter her daughter in the lottery again next year. Jane Doe No. 1's mother also hopes that her younger daughter will have the option to attend a quality public charter school when she becomes old enough.

17. John Doe No. 2 is an 8 year-old African-American boy who lives with his mother and older sister in Dorchester. John Doe No. 2 applied to attend the Edward Brooke Roslindale Public Charter School, but was denied a spot through the lottery. He presently attends third grade at a district school in Boston that fails to provide a constitutionally adequate education to its students. John Doe No. 2's mother is concerned that at his current school he is not getting the education and support he needs to be prepared to succeed in high school and beyond.

18. John Doe No. 3 is a 6 year-old boy of Hispanic descent who lives with his mother and younger sister in Dorchester. John Doe No. 3 applied to multiple public charter schools in each of the last two years, but was denied a spot in each lottery in both years. John Doe No. 3 is assigned to a district school in Boston that fails to provide a constitutionally adequate education to its students. His mother views this as an unacceptable option and is paying tuition for John Doe No. 3 to attend first grade at a parochial school instead. Due to the financial burden, this is not a sustainable option for the family, and she plans to again apply to charter schools in the upcoming year.

19. Jane Doe No. 2 is a 13 year-old African-American girl who lives with her mother and younger sister in Dorchester. Jane Doe No. 2 applied to attend multiple public charter schools for the upcoming year, but was denied a spot in each lottery. Jane Doe No. 2 presently attends a district school that fails to provide a constitutionally adequate education to its students. Jane Doe No. 2's younger sister won the charter lottery and attends the Boston Collegiate Charter School. Jane Doe No. 2's mother believes that her older daughter will receive an inferior education to her sister and wants both daughters to attend a quality school.

B. The Plaintiff Class

20. Many thousands of children currently sit on waitlists to attend public charter schools in Boston. On information and belief, hundreds or thousands of these children presently attend or are assigned to attend failing district schools, like the plaintiffs.

21. Faced with the prospect of sending their children to a failing district school, many parents have taken dramatic steps to ensure that they receive an adequate education. Some parents of children in the class pay thousands of dollars per child to send the class members to parochial or other private schools. The interest of these children in vindicating their right to a constitutionally adequate public education is not diminished by their parents' efforts to mitigate the harm caused by the arbitrary cap on public charter schools.

C. The Defendants

22. Defendant James A. Peyser is the Massachusetts Secretary of Education. In this capacity, he oversees the Executive Office of Education and is responsible for the overall administration of public education in the Commonwealth and the Governor's education reform agenda.

23. Defendant Paul Sagan is the Chair of the Massachusetts Board of Elementary and Secondary Education ("BESE"). In that capacity, he, with the other Members of the BESE, is responsible for the administration and enforcement of the charter school cap.

24. Defendant Mitchell D. Chester is the Commissioner of Elementary and Secondary Education and a Member of the BESE. In the first capacity, he is responsible for appointing fact-finding teams assessing the under-performance of public schools and is himself responsible for assessing the prospects for school district improvement. G.L. c. 69, § 1A. In the second capacity, he, with the other Members of the BESE, is responsible for the administration and enforcement of the charter school cap.

25. The remaining defendants are Members of the BESE and, in this capacity, are responsible for the administration and enforcement of the charter school cap.

JURISDICTION AND VENUE

26. This Court has jurisdiction pursuant to Mass. Gen. Law c. 231A, §§ 1 and 2, and Mass. Gen. Laws c. 212, § 4.

27. This case raises questions under the Massachusetts Constitution as to the plaintiffs' and class members' rights and requests declaratory relief. Venue is proper under Mass Gen. Laws c. 223, § 1, as the plaintiffs reside in Suffolk County, and the constitutional violations occur here.

CLASS ACTION ALLEGATIONS

28. Plaintiffs bring this action as a class action pursuant to Massachusetts Rule of Civil Procedure 23 on behalf of themselves and all other children attending or assigned to attend constitutionally inadequate schools in Boston who have applied, but failed to gain entry via the lottery, to public charter schools (the "Class").

29. The members of the Class are so numerous that joinder of all of them would be impracticable. While the exact number of class members is unknown to plaintiffs, based on the thousands of children presently on the waitlist for admission to public charter schools in Boston, there are many hundreds, if not thousands, of class members.

30. Plaintiffs' claims are typical of the claims of the Class, since plaintiffs and the other members of the Class have sustained and will sustain the same injury—an arbitrarily reduced opportunity to receive a constitutionally adequate public education—as a result of the constitutional violations alleged herein. Plaintiffs do not have any interests that are adverse to or antagonistic to those of the Class. Plaintiffs will fairly and adequately protect the interests of the

Class. Plaintiffs are committed to the vigorous prosecution of this action and have retained counsel competent and experienced in the field of constitutional law.

31. There are questions of law and fact common to the members of the Class that predominate over any questions which, if they exist, may affect only individual class members. The predominant questions of law and fact include, among others, whether:

i. the Education Clause, Part II, Chapter 5, § 2, of the Massachusetts Constitution imposes a judicially enforceable obligation on the Commonwealth to provide an adequate education to all students;

ii. the arbitrary statutory caps on the number of public charter schools and the allocation of funding to public charter schools imposed by Massachusetts General Law, Chapter 71, § 89(i) violate the Education Clause, Part II, Chapter 5, § 2, of the Massachusetts Constitution;

iii. the arbitrary statutory caps on the number of public charter schools and the allocation of funding to public charter schools imposed by Massachusetts General Law, Chapter 71, § 89(i), as applied to less affluent communities in cities such as Boston, violate the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution; and

iv. the proper remedy for these violations of the Massachusetts Constitution is a declaration that the charter school caps are unconstitutional and an injunction preventing defendants from enforcing the caps, or something else.

32. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Further, the burden and expense of prosecuting a litigation of this nature makes it unlikely that members of

the Class would prosecute individual claims. Plaintiffs anticipate no difficulty in management of this action as a class action. Further, the prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying results, which may establish incompatible standards of conduct.

FACTS

I. MASSACHUSETTS FAILS TO PROVIDE A CONSTITUTIONALLY ADEQUATE EDUCATION TO ALL OF ITS STUDENTS

A. The Massachusetts Constitution Requires The Commonwealth To Provide An Adequate Education To All Children In The State

33. The Massachusetts Constitution provides that "it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them," including the "public schools and grammar schools in the towns." Mass. Constitution, Part II, c. 5, § 2.

34. As interpreted by the Supreme Judicial Court, this constitutional provision imposes upon the Commonwealth "a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level." *McDuffy*, 415 Mass. at 606.

35. Ultimate responsibility for satisfying this mandate lies with the Commonwealth. As the Supreme Judicial Court has explained, "it is the responsibility of the Commonwealth to take such steps as may be required in each instance to devise a plan and sources of funds sufficient to meet the constitutional mandate" to provide an adequate education for each child. *McDuffy*, 415 Mass. at 621. While the political branches may exercise their discretion in meeting this constitutional mandate, that exercise of discretion must be based upon legitimate educational criteria.

B. Historically Massachusetts Has Not Provided All Of Its Children With The Adequate Education Mandated By The Commonwealth's Constitution

36. For decades, Massachusetts has provided an adequate education to only some of its children while leaving others behind. In particular, many children in the Commonwealth's less affluent school districts receive inadequate educations, while their peers in more affluent school districts receive adequate (and often excellent) educations.

37. In 1993, the Supreme Judicial Court recognized that children in the Commonwealth's less affluent communities were not receiving their constitutional entitlement to an adequate education. In particular, the Supreme Judicial Court found that students in these communities were offered "significantly fewer educational opportunities and lower educational quality than students" in wealthier school districts. *McDuffy*, 415 Mass. at 616-617.

38. Following the Supreme Judicial Court's decision, Massachusetts enacted the '93 Act. Among other things, the Act restructured school funding, set forth a system of evaluating student performance, and created a system for evaluating underperforming school districts.

39. A dozen years later, the Supreme Judicial Court revisited the Education Clause in *Hancock*. At that time, students in less affluent districts continued to lag behind. *Hancock*, 443 Mass. at 453 (opinion of Marshall, J.). The controlling plurality opinion nevertheless declined to find a constitutional violation. Instead, the plurality decided that the Commonwealth should be given more time to implement the '93 Act. *Id.* at 459.

40. More than 20 years now have passed since *McDuffy* and the '93 Act, and 10 years have passed since *Hancock*. Yet gross inequities in education persist. Many children in less affluent districts in the Commonwealth attend failing schools, and thus still do not receive an adequate education.

C. Massachusetts Continues To Compel Children In Boston And Other Similar School Districts To Attend Inadequate Public Schools While Children In Other Districts Attend Excellent Schools

41. Boston is one district in the Commonwealth in which for years—including the more than 20 years since *McDuffy* was decided—many students have been forced to attend constitutionally inadequate schools.

42. While excellent district schools exist in Boston, many schools in Boston fail to provide a constitutionally adequate education to students. Since 2010, 17 different Boston district schools have been designated at various times by the Commonwealth as "Level 4" schools. Level 4 schools are considered Massachusetts' most struggling schools. For a school to be designated as a Level 4 school, it must be among the lowest achieving and least improving schools in the Commonwealth for several years.

43. Of the 12 Boston schools that were first designated as Level 4 in 2010, half have shown little or no improvement: Three are still in Level 4 status, two have been placed into receivership, and one school has been closed.

44. Since 2010, 59 schools in the Commonwealth have been designated as Level 4 schools. In addition to the 17 Level 4 schools in Boston, 16 schools from Springfield have been designated as Level 4 schools, 8 from Lawrence, 4 each from Fall River and Worcester, 3 from New Bedford, and 2 each from Lynn and Holyoke. Unsurprisingly, these schools are in predominantly urban, lower-income communities.

45. The story is very different for children who attend public schools in many of the wealthier towns that neighbor Boston. For example, in 2014 in Arlington, Belmont, Brookline, Concord, Hingham, Lexington, Newton, Weston, Westwood, and Winchester, more than 83% of tested students in all grades passed the Massachusetts Comprehensive Assessment System

("MCAS") for English Language Arts ("ELA"), more than 78% passed the examination in mathematics, and more than 72% passed the science examination.

46. Moreover, the schools in these more affluent districts consistently succeed. In every year dating back to 2010, more than 83% of the tested students in these towns passed the MCAS for ELA, at least 74% passed the MCAS for mathematics, and at least 67% passed the MCAS for science. In many of these towns, scores have been even higher than these minimums.

47. None of these districts has ever had a single school designated as one of the Commonwealth's most struggling schools.

D. The Plaintiffs Attend Constitutionally Inadequate Public Schools In Boston

48. The plaintiffs and class members attend or are assigned to attend schools in Boston that are constitutionally inadequate. These schools, including each of the following, regularly fail to provide an adequate education and regularly fail to prepare their students to attend college or to enter the workforce.

i. <u>John Doe No. 1's District School</u>

49. John Doe No. 1 attends a district school that fails to provide a constitutionally adequate education to its students. In each of the last five years, it has failed to teach even half of its students to be proficient or higher in any subject. In fact, in the last five years no more than 35% of this school's tested students have achieved proficiency in any subject.

50. In 2014, only 31% of the tested students at John Doe No. 1's school were proficient or higher in ELA; only 35% were proficient or higher in mathematics; and only 26% were proficient or higher in science.

51. John Doe No. 1's school is designated by the Commonwealth as a Level 3 school, in the bottom fifth of all schools statewide.

ii. Jane Doe No. 1's District School

52. Jane Doe No. 1 attends a district school that fails to provide a constitutionally adequate education to its students. In each of the last five years, this school has failed to teach even one-quarter of its students to be proficient or higher in any subject.

53. In 2014, only 10% of the tested students at Jane Doe No. 1's school were proficient or higher in ELA; only 17% were proficient or higher in mathematics; and only 10% were proficient or higher in science.

54. Students and families recognize that Jane Doe No. 1's school is failing. In the 2014-2015 Boston Public School lottery, for 59 available seats, only 15 students selected this school as their first choice.

55. Jane Doe No. 1's school is designated by the Commonwealth as a Level 4 school—among the lowest achieving and least improving schools statewide.

iii. John Doe No. 2's District School

56. John Doe No. 2 attends a district school that fails to provide a constitutionally adequate education to its students. In each of the last five years, it has failed to teach even half of its students to be proficient or higher in any subject.

57. In 2014, only 30% of the tested students at John Doe No. 2's school were proficient or higher in ELA; only 37% were proficient or higher in mathematics; and only 30% were proficient or higher in science.

58. In 2014, only one-fifth of John Doe No. 2's school's third grade students were proficient or higher in reading.

59. John Doe No. 2's school is designated by the Commonwealth as a Level 3 school, in the bottom fifth of all schools statewide.

iv. John Doe No. 3's District School

60. John Doe No. 3 was assigned to attend a school that fails to provide a constitutionally adequate education to its students. In each of the last five years, it has failed to teach even one-third of its students to be proficient or higher in any subject.

61. In 2014, only 18% of the tested students at John Doe No. 3's school were proficient or higher in ELA; only 15% were proficient or higher in mathematics; and only 13% were proficient or higher in science.

62. Astoundingly, in the last year, zero percent of the tested students at John Doe No. 3's school reached an advanced level of proficiency in ELA or science.

63. John Doe No. 3's school is designated by the Commonwealth as a Level 4 school—among the lowest achieving and least improving schools statewide.

v. Jane Doe No. 2's District School

64. Jane Doe No. 2 attends a district school that fails to provide a constitutionally adequate education to its students. In each of the last five years, it has failed to teach even half of its students to be proficient or higher in any subject.

65. In 2014, only 39% of the tested students at Jane Doe No. 2's school were proficient or higher in ELA; only 33% were proficient or higher in mathematics; and only 6% were proficient or higher in science.

66. Jane Doe No. 2's school is designated by the Commonwealth as a Level 3 school, in the bottom fifth of all schools statewide.

67. Each of the plaintiffs was assigned to a school that fails to teach children many of the skills that the Supreme Judicial Court identified in *McDuffy*, 415 Mass. at 618-19 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)), as the hallmarks of a minimally adequate education:

i. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

ii. sufficient knowledge of economic, social, and political systems to enable students to make informed choices;

iii. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

iv. sufficient self-knowledge and knowledge of his or her mental and physical wellness;

v. sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

vi. sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

vii. sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

II. PLAINTIFFS SOUGHT TO ATTEND PUBLIC CHARTERS SCHOOLS THAT PROVIDE STUDENTS LIKE THEM WITH A CONSTITUTIONALLY ADEQUATE EDUCATION

68. Faced with the prospect of attending a constitutionally inadequate school, each of the plaintiffs applied to attend a public charter school in the hopes of obtaining at least an adequate education.

A. An Introduction To Public Charter Schools

69. Massachusetts law provides for the establishment of "public charter schools." Public charter schools are not private schools, but instead are public schools granted their charters to operate from the BESE.

70. Public charter schools are funded by payments calculated to reflect the actual per pupil spending amount that would be expended in the students' home districts if the students attended a district school. G.L. c. 71, § 89(ff). These payments are paid to the public charter schools and deducted from the budget allocated to the students' home districts. *Id.*[1]

71. The first public charter schools opened in Massachusetts in 1995 following their authorization by the '93 Act. The original public charter schools authorized by the '93 Act are sometimes referred to as "Commonwealth" charter schools. They operate independent of district school committees and are managed by their own boards of trustees. G.L. c. 71, § 89(c).

72. In order to open a public charter school, a charter applicant must complete an exacting, comprehensive review process. G.L. c. 71 § 89(e). The school must then apply for charter renewal once every five years. *Id.* § 89(dd). During that renewal process, BESE evaluates whether the public charter school is fulfilling the objectives set forth by its charter, and also assesses the school's level of academic achievements, curricular innovations, and ability to recruit and retain students. *Id.*

73. In exchange for this heightened level of accountability, public charter schools receive greater autonomy in their operations in comparison to non-charter public schools. Public charter schools have greater flexibility to implement educational innovations and reforms, such

[1] In a year when the aggregate payments by a school district to public charter schools increases over the prior year, the increase is offset by payments from the Commonwealth equal to one-hundred percent of the increase in the first year, and twenty-five percent of the increase in each of the following five years. An Act Relative to the Achievement Gap, Mass. Stat. 2010, c. 12, § 7(gg).

as longer school days. They also have far greater discretion with respect to their staffing decisions, including the hiring and retention of teachers.

74. There currently are 71 public charter schools in the Commonwealth, educating approximately 34,000 students.

B. Public Charter Schools Have Done An Excellent Job Educating Children Who Otherwise Would Have Attended Failing Schools

75. Public charter schools in Massachusetts have produced remarkable results for students in districts where many of the district schools regularly fail to provide students with an adequate education. Thus, what began as an experiment in the Commonwealth has evolved into a proven mechanism for providing educational opportunities.

76. As early as 1997, a preliminary Massachusetts Department of Education study of test results from the first students to attend public charter schools found that the students in every public charter school (for which there was sufficient test score data for analysis) were making noticeable academic gains relative to their peers. Robert Antonucci, the Commissioner of Education at the time of the 1997 study, remarked that it showed public charter schools to be "promising."[2]

77. A study of public charter school performance conducted by the Department of Education in 2001 found substantial academic improvement by students attending charter schools across the Commonwealth. The study found that 64% of classes at public charter schools made greater than average gains in math and that 58% of classes made greater than average gains in reading.[3]

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[2] *Test Results from Massachusetts Charter Schools: A Preliminary Study*, Massachusetts Department of Education (June 1997).

[3] *The Massachusetts Charter School Initiative: A Report of the Massachusetts Department of Education*, Massachusetts Department of Education, p. 10 (2001).

C. Independent Research Confirms The Quality Of Boston's Public Charter Schools—And The Difference In Quality Between Public Charter Schools And Non-Charter Public Schools

78. Independent studies confirm that public charter schools provide students with an excellent education, particularly in comparison to district schools in Boston.

79. In 2009, the Massachusetts Department of Elementary and Secondary Education and The Boston Foundation commissioned a study by Harvard University's Center for Education Policy and Research to compare the performance of students at charters schools to their peers in non-charter public schools.[4]

80. The results of that study showed that the academic performance gains among Boston charter-school students were significantly greater than those of their peers who had applied to charter schools but were denied admission because of the lottery. The authors of that study found "large positive effects for Charter Schools, at both the middle school and high school levels" and that "[t]he estimated impact on math achievement for Charter middle schools is extraordinarily large." They concluded that public charter schools in Boston "appear to have a consistently positive impact on student achievement in all MCAS subjects in both middle school and high school."[5]

81. A follow-up study performed in 2011 yielded similar results, with the study's authors concluding that "the results for urban middle schools show large, positive, and statistically significant effects on ELA and math scores." Defendant Mitchell Chester, the Commissioner of Elementary and Secondary Education, wrote that the study's "findings are

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[4] Abdulkadiroglu, Atila, et al., *Informing the Debate: Comparing Boston's Charter, Pilot, and Traditional Schools*, The Boston Foundation (January 2009).

[5] *Id.*

provocative. They suggest that students in Massachusetts' charter middle and high schools often perform better academically than their peers in traditional public schools."[6]

82. Numerous studies confirm that the positive effect of public charters schools is most pronounced for students who attend urban and specifically Boston charter schools and for those students who begin with the lowest scores. Indeed, for these students, the effect of attending a public charter school is simply stunning.

83. The 2011 study performed by Harvard researchers explained that "urban charter schools do especially well with minority and low-income students . . . . An analysis that interacts charter attendance with students' baseline scores shows that *urban charter schools boost achievement most for students who start out with the lowest scores.*"[7]

84. In 2013, a team of researchers from MIT's School Effectiveness and Inequality Initiative performed another follow-up to the 2009 and 2011 studies.[8] Looking specifically at the relative performance of Boston's charter schools versus non-charter Boston public schools, the MIT researchers wrote:

> The results reported here show that the causal impact of attending a year at a Boston charter school is large and positive in both [math and ELA] and both school levels .... The positive per-year charter effect on middle school proficiency rates was 12 percentage points in math and 6 percentage points in English. At high school the per-year charter effect was approximately 10 percentage points in both subjects. In high school, the charter effect on reaching the advanced level on the MCAS was especially high, with increases of 18 percentage points in math and 12 percentage points in English, per year of attendance.

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6 Angrist, Joshua, et al., *Student Achievement in Massachusetts' Charter Schools*, Center for Education Policy Research, Harvard University (2011).

7 *Id.*

8 Cohodes, Sarah R., et al., *Charter School Demand and Effectiveness*, The Boston Foundation (2013).

85. Another study conducted by the same team of researchers analyzed the long-term effect of public charter school attendance.[9] The researchers found that the positive effects associated with Boston's "high-performing charter high schools are remarkably persistent." Specifically, the researchers concluded that attendance at a Boston public charter school raises the probability that students pass exams required for high-school graduation, increases the likelihood that students qualify for an exam-based college scholarship, increases the frequency of Advanced Placement test-taking, substantially increases SAT scores, and increases the likelihood that students attend a four-year college.

III. THE CHARTER SCHOOL CAP ARTIFICIALLY CONSTRAINS THE EDUCATIONAL OPPORTUNITIES AVAILABLE TO CHILDREN IN DISTRICTS WITH INADEQUATE NON-CHARTER PUBLIC SCHOOLS

A. The Charter School Cap Prevents The Creation Of New, High-Quality Charter Schools In Boston And The Expansion of Existing Schools

86. Given their proven success in educating minority, lower-income children, one would expect the Commonwealth to be aggressively supporting the expansion of public charter schools in failing school districts. Yet, despite the success of public charter schools in educating student-populations that frequently are failed by non-charter public schools, the Commonwealth has erected a barrier to their expansion. This barrier has had the effect of making it more difficult for thousands of applicants—including each of the plaintiffs and class members—to attend public charter schools in order to obtain the adequate education they are constitutionally due.

87. Specifically, Massachusetts law caps both the total number of public charter schools in the Commonwealth and the percentage of any school district's total funding that may

[9] Angrist, Joshua, et al., *Charter Schools and the Road to College Readiness*, The Boston Foundation, 2013. Other studies confirm the superb performance of Boston's public charter schools. Researchers from Stanford University's Center for Research on Educational Outcomes ("CREDO") wrote that "[t]he average math and reading growth found in Boston's charter schools is the largest state or city level impact CREDO has identified thus far." CREDO, *Charter School Performance in Massachusetts*, 2013.

be paid to public charter schools. G.L. c. 71, § 89(i). Prior to 2010, the total payments to public charter schools were not permitted to exceed 9% of the district's net school spending. *Id.* § 89(i)(3). In addition, the law capped the total number of Commonwealth public charter schools at 72. *Id.* § 89(i)(1).

88. In 2010, the charter school cap was amended so that, if a school district is among the worst-performing 10% of school districts in the state, the percentage of its funding that can be allocated to public charter schools was automatically increased to 12% and would continue to increase by 1% each year up to a maximum of 18%. Mass. Stat. 2010, c. 12, § 9.

89. The 2010 amendment also provided a limited exemption from the Commonwealth's overall limitation on the number of public charter schools, allowing public charter school operators with a track record of success to open schools in low-performing districts without counting against that particular cap. Even with this amendment, however, these proven providers remain subject to the funding cap. The funding limitation thus acts as a hard cap on the number of seats available in charter schools.

90. Caps set by the Massachusetts legislature on public charter schools have long constrained the creation of new, high-quality public charter schools within Boston. Modest increases to the caps since the '93 Act have not come close to meeting the overwhelming demand for public charter schools.

91. The City of Boston is among the bottom 10% of all school districts statewide on measures of student performance. The funding increase allowed by the 2010 legislation has not come close to meeting demand for public charter school admissions in Boston. New charter school seats are quickly filled, and the number of families searching for a charter school seat continues to grow.

92. By early 2013, virtually all of the new charter seats permitted under the 2010 amendment already had been allocated to public charter schools and Boston had effectively reached its cap. The Commonwealth has been required to reject applications to open schools even if those applications have merit.

93. But for the charter school cap, more high-quality public charter schools could open in Boston, allowing many more children to attend these schools. Previous increases in the charter school cap have led to dramatic increases in the number of applications to open charter schools, including by existing high-quality charter schools with proven track records. For example, in 2010, the charter school office received 42 applications, compared to only 14 in 2009.[10]

94. Many of Boston's best public charter school networks have demonstrated a capacity and desire to expand while replicating excellent results. But the charter school cap prevents these proven charter school providers from educating more Boston children.[11]

95. Massachusetts law sets forth criteria for the grant of a charter to a proposed school, for the opening of a public charter school, and for the renewal of an existing school's charter. Under existing law, a proposed charter school must describe to the Board the "innovative methods" to be used in the school and the "educational program, instructional methodology and services to be offered to students." G.L. c. 71, § 89(e).[12] A public charter school must also demonstrate a capacity to assure that students meet performance and achievement standards and

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[10] Massachusetts Department of Elementary and Secondary Education, Press Release, "42 groups submit new charter school prospectuses." (Aug. 16, 2010).

[11] When the Commonwealth announced this year that it was authorizing an additional 668 seats in Boston public charter schools, ten Boston charter school operators applied to expand their existing schools or open a new one. Massachusetts Department of Elementary and Secondary Education, Press Release, "10 Groups Seek to Open New Charter Schools, 19 Schools Apply to Serve More Students" (August 3, 2015), *available at* http://www.doe.mass.edu/news/news.aspx?id=21098.

[12] To be granted a charter, a proposed school must also provide to the Board a plan to "disseminat[e] successes and innovations of the charter school to other non-charter public schools." G.L. c. 71, § 89(e).

develop an accountability plan to ensure that the charter school is meeting its educational objectives. 603 CMR 1.04(3). Finally, the renewal of a school's charter is contingent upon a public charter school demonstrating "progress made in student academic achievement" and that the charter school has "met its obligations and commitments." G.L., c. 71, § 89(dd).

96. Pursuant to these regulations, public charter schools are subject to rigorous oversight by the members of the Massachusetts Board of Elementary and Secondary Education, many of whom are experts in the field of education.[13] For example, applications to open new public charter schools are subject to a detailed, multi-step review process, including (1) review by Department of Elementary and Secondary Education staff and by external reviewers; (2) four public hearings; (3) solicitation of written public comments; (4) an invitation to comment to the superintendent of the relevant school district; (5) interviews of the applicants and proposed trustees; (6) preparation by Department staff of criteria-based summaries of the evidence identified within the application and during the interview process of the applicant's capacity to open and operate a high quality school; and (7) a vote by the BESE.[14]

97. After a public charter school has been approved, the BESE is required to conduct an ongoing review through site visits and the examination of annual performance reports and, by the fifth year of operation, must decide whether the charter should be renewed.[15]

98. These laws, regulations, and systems of administrative oversight ensure that public charter schools provide a quality education. If the cap is lifted, whether enrollment in public charter schools actually expands will be dictated by the best interests of students as

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13 For biographies of the Board's members, see http://www.doe.mass.edu/boe/edboard.html.

14 http://www.doe.mass.edu/boe/docs/2015-02/item4.html

15 Guide to Charter School Accountability, http://www.doe.mass.edu/charter/guides/AcctGuide.pdf

determined through careful case-by-case analyses performed by the BESE's experts, not by an arbitrary percentage in a statute.

B. The Charter School Cap Relegates Boston Children To A Lottery For An Adequate Education

99. Under Massachusetts law, if the total number of eligible students who apply to a charter school exceeds the number of available seats, admission to the public charter school is determined by a lottery. G.L. c. 71, § 89(n).

100. Public charter school enrollment in Boston is limited by the charter school cap and the demand for seats in charter schools exceeds the number of seats available. Children in Boston who apply to attend public charter schools, including each of the plaintiffs and class members, therefore are subject to a lottery which determines whether they are admitted.

IV. THE CHARTER SCHOOL CAP ARBITRARILY DEPRIVES CHILDREN IN SCHOOL DISTRICTS WITH FAILING SCHOOLS OF AN EQUAL OPPORTUNITY TO RECEIVE AN ADEQUATE EDUCATION

101. The plaintiffs and class members have been assigned to attend failing Boston public schools. These schools fail to educate their students, which will harm the plaintiffs and other class members for the rest of their lives. At the same time, within the City of Boston, there exist public charter schools with proven track records of providing an excellent education to populations regularly failed by non-charter public schools. There would be more such schools available to provide an adequate education to even more children if not for the Commonwealth's arbitrary cap.

102. Because the charter school cap limits the funding available to public charter schools and therefore the number of seats available, the plaintiffs and class members were required to enter a lottery which would determine whether or not they would be permitted to attend a public charter school. Each of the plaintiffs and class members lost this lottery and

instead attends a non-charter public school or has taken extraordinary steps to obtain a quality education outside of the public school system. The schools these children attend or have been assigned to attend fail to provide the adequate education mandated by the Massachusetts Constitution.

103. The charter school cap imposes an arbitrary limit on the growth of public charter schools which bears no relation to any legitimate educational goal. Absent the cap, the expansion of public charter schools would be governed by factors intrinsic to the educational mission and the success of public charter schools in achieving that mission. The charter cap dispenses with any legitimate education-related criteria in favor of a flat cap on public charter school growth that is unrelated and extrinsic to any educational purpose.

104. The cap on public charter schools and the resulting lottery system disproportionally impact children in less affluent school districts with failing schools. Children in more affluent, better performing school districts do not have their educational fates determined by lottery. In those school districts, all of the public schools to which a child could be assigned provide an adequate (and often excellent) education.

105. The charter school cap deprives children in Boston of the same opportunity. The cap has prevented each of the plaintiffs and class members from attending a quality charter school, which would satisfy the Commonwealth's constitutionally mandated educational obligations. Instead, these children are assigned to attend failing non-charter public schools, which do not.

COUNT I

VIOLATION OF THE EDUCATION CLAUSE, PART II, CHAPTER 5, SECTION 2, OF THE MASSACHUSETTS CONSTITUTION

106. The preceding paragraphs are incorporated as if set forth fully herein.

107. The plaintiffs currently attend or are assigned to attend non-charter public schools that are constitutionally inadequate. The Commonwealth's efforts to reform these schools since 1993, using a variety of measures, have not succeeded.

108. Constitutionally adequate public charter schools are operating in Boston and more would enter the system if permitted. But the chances for the plaintiffs and the many similarly situated children in the Class of attending these schools are arbitrarily depressed because Mass. Gen. Laws c. 71, § 89(i) imposes an artificial cap upon the number of seats available in public charter schools.

109. Part II, Chapter 5, § 2, of the Massachusetts Constitution requires the Commonwealth to "cherish" education and work to assure that every child receives an adequate education. The Commonwealth does not discharge its constitutional responsibility to provide every child with an education when it takes a proven tool to provide an adequate education—public charter schools—and unnecessarily limits access to this resource to only 18% of children in failing school districts.

110. The charter school cap therefore violates Part II, Chapter 5, § 2, of the Massachusetts Constitution.

COUNT II

VIOLATION OF THE MASSACHUSETTS DECLARATION OF RIGHTS, ARTICLES I, VI, VII, X, XII AND PART II, CHAPTER 1, SECTION 1, ARTICLE 4 OF THE MASSACHUSETTS CONSTITUTION

111. The preceding paragraphs are incorporated as if set forth fully herein.

112. Under the Education Clause, the Commonwealth has ultimate responsibility for the education of all children in the Commonwealth. Yet the charter school cap arbitrarily subjects similarly situated children in the Commonwealth to disparate treatment.

113. In many school districts—particularly more affluent districts—all children are able to attend adequate public schools. The ability of these children to obtain an education is not contingent on the good luck of winning a lottery.

114. Children in less affluent communities such as Boston do not have the same unqualified opportunity for an education. Because of the charter school cap, children are required to enter a lottery to determine who will be permitted to attend adequate schools. The winners of the lottery attend adequate schools. The losers of the lottery commonly attend schools that are constitutionally inadequate and are thus deprived of the adequate education guaranteed by the Massachusetts Constitution.

115. The arbitrary charter school cap, by forcing children in less affluent communities into a lottery for an adequate education that children in more affluent communities need not confront, denies the plaintiffs and other class members the same opportunity to receive an adequate education that their peers in other, more affluent school districts enjoy.

116. For this reason, the charter school cap infringes plaintiffs' and the Class's rights under the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that this Court enter the following relief on behalf of plaintiffs and the Class:

1. Enter a declaration that the Commonwealth has violated the Education Clause, Part II, Chapter 5, § 2, of the Massachusetts Constitution by failing to provide an adequate public education to the plaintiffs;
2. Enter a declaration that Mass. Gen. Laws c. 71, §§ 89(i) violates Part II, Chapter 5, § 2 of the Massachusetts Constitution;
3. Enter a declaration that Mass. Gen. Laws c. 71, § 89(i) infringes plaintiffs' and the Class's rights under the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution;
4. Enter an order enjoining Defendants from enforcing Mass. Gen. Laws c. 71, § 89(i);
5. Grant such other relief as is just and appropriate.

Respectfully submitted,

William F. Lee (BBO# 291960)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
William.Lee@wilmerhale.com

(AMW)

Paul F. Ware Jr. (BBO# 516240)
Kevin P. Martin (BBO# 655222)
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000
pware@goodwinprocter.com
kmartin@goodwinprocter.com

Michael B. Keating (BBO# 263360)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
mkeating@foleyhoag.com

Attorneys for Plaintiffs

Dated: September 15, 2015

TAB 5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

JANE DOES NOS. 1-2 and JOHN DOE NOS. 1-3,

Plaintiffs,

v.

Civil Action No. 15-2788-F

JAMES A. PEYSER, as Secretary of Education; PAUL SAGAN, as Chair of the Board of Elementary and Secondary Education; MITCHELL D. CHESTER, as Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education; KATHERINE CRAVEN, EDWARD DOHERTY, ROLAND FRYER, MARGARET MCKENNA, MICHAEL MORIARTY, JAMES MORTON, PENDRED NOYCE, MARY ANN STEWART, and DONALD WILLYARD, as Members of the Board of Elementary and Secondary Education,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Pursuant to Mass. R. Civ. P. 12(b)(1) and (b)(6), defendants respectfully move to dismiss all claims filed against them by plaintiffs in this action. As grounds for this motion, defendants state as follows:

1. Plaintiffs filed this action on September 15, 2015. In their complaint, plaintiffs seek a ruling that G.L. c. 71, § 89(i), the charter school cap, violates the Massachusetts Constitution.

2. Plaintiff's complaint should be dismissed in its entirety for lack of jurisdiction for the following reasons:

(a) There is no actual controversy warranting declaratory judgment because Boston, the district where plaintiffs reside and whose students plaintiffs seek to represent as a class, is not at the charter school cap. Massachusetts is not at the numerical cap for either Horace Mann or Commonwealth charter schools. The net school funding cap does not apply to Horace Mann charter schools at all, and Boston is not at the net school funding cap for Commonwealth charter schools.

(b) Because Section 89(i) does not now limit authorization of new charter schools and expansions in Boston, plaintiffs lack standing to challenge its constitutionality.

(c) Plaintiffs lack standing because they have not applied to all or even most charter school opportunities available to them.

(d) Plaintiffs lack standing because the causal link between the existence of the charter school cap and the constitutionally inadequate education they allegedly receive is illogical, highly speculative, and remote.

3. In Count I, plaintiffs claim that Section 89(i) violates the Education Clause, Mass. Const. Part II, c. 5, § 2. If the Court concludes that it has jurisdiction, it should dismiss Count I for the following reasons:

(a) Plaintiffs do not plausibly allege systemic deprivation of the right to education.

(b) Plaintiffs do not plausibly allege state action that has caused a violation of the Education Clause.

(c) The Education Clause does not allow the specific judicial remedy that plaintiffs seek: invalidation of the charter school growth management strategy adopted by the Legislature in G.L. c. 71, § 89(i).

4. In Count II, plaintiffs claim that Section 89(i) violates various constitutional provisions involving equal protection of the laws and due process – *i.e.*, "the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution." If the Court concludes that it has jurisdiction, it should dismiss Count II for the following reasons:

(a) Plaintiffs' vague allegations regarding "more affluent" and "less affluent" communities do not allow this Court to identify those children who have allegedly suffered discrimination.

(b) Section 89(i) does not discriminate against plaintiffs or their communities in any manner.

(c) Section 89(i) does not implicate a fundamental right or a suspect classification.

(d) Section 89(i) is rationally related to legitimate state interests.

(e) Legislative acts are not subject to procedural due process challenges.

(f) Plaintiffs do not allege a liberty or property interest sufficient to trigger procedural due process protections.

(g) Plaintiffs do not allege a deprivation of notice or an opportunity to be heard.

WHEREFORE, for these reasons and the reasons set forth in their supporting memorandum of law, defendants request that the Court dismiss all claims against them in the complaint.

Respectfully submitted,

Defendants,

JAMES A. PEYSER, as Secretary of Education; PAUL SAGAN, as Chair of the Board of Elementary and Secondary Education; MITCHELL D. CHESTER, as Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education; KATHERINE CRAVEN, EDWARD DOHERTY, ROLAND FRYER, MARGARET MCKENNA, MICHAEL MORIARTY, JAMES MORTON, PENDRED NOYCE, MARY ANN STEWART, and DONALD WILLYARD, as Members of the Board of Elementary and Secondary Education,

By their attorney,

MAURA HEALEY
ATTORNEY GENERAL

Robert E. Toone (BBO# 663249)
Juliana deHaan Rice (BBO# 564918)
Julia Kobick (BBO# 680194)
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-963-2583
Juliana.Rice@state.ma.us

Dated: November 13, 2015

CERTIFICATE OF SERVICE

I, Robert E. Toone, Assistant Attorney General, hereby certify that I have on this day served the within Defendants' Motion to Dismiss and Memorandum of Law in Support of Defendants' Motion to Dismiss upon all relevant parties by hand delivering a copy to:

William F. Lee
Felicia H. Ellsworth
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, Massachusetts 02109

Robert E. Toone, BBO# 663249
Assistant Attorney General
One Ashburton Place
Government Bureau
Boston, Massachusetts 02108
(617) 963-2178
robert.toone@state.ma.us

November 13, 2015

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

JANE DOES NOS. 1-2 and JOHN DOE NOS. 1-3,

Plaintiffs,

v.

JAMES A. PEYSER, as Secretary of Education; PAUL SAGAN, as Chair of the Board of Elementary and Secondary Education; MITCHELL D. CHESTER, as Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education; KATHERINE CRAVEN, EDWARD DOHERTY, ROLAND FRYER, MARGARET MCKENNA, MICHAEL MORIARTY, JAMES MORTON, PENDRED NOYCE, MARY ANN STEWART, and DONALD WILLYARD, as Members of the Board of Elementary and Secondary Education,

Defendants.

Civil Action No. 15-2788-F

Leave to File in Excess of 20 Pages Granted on November 13, 2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

MAURA HEALEY
ATTORNEY GENERAL

Robert E. Toone (BBO# 663249)
Juliana deHaan Rice (BBO# 564918)
Julia Kobick (BBO# 680194)
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-963-2583
Juliana.Rice@state.ma.us

Dated: November 13, 2015

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INTRODUCTION

Massachusetts has the strongest elementary and secondary school system in the nation.[1] This is due in part to the high value placed on education by the citizenry, the hard work and commitment of educators throughout the Commonwealth, and the education reforms enacted by the Legislature immediately following the Supreme Judicial Court's ruling in *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545 (1993). More remains to be done, however, and a vigorous debate continues among voters, legislators, and policymakers (including the ones sued as defendants in this case) about how the Commonwealth can most effectively provide a high-quality education to all of its children. This debate encompasses a broad range of issues, including the content of uniform curriculum standards, methods for assessing student achievement, recruitment and retention of teachers, funding and accountability for the lowest-performing school districts, and the education of English language learners and children with special needs. It also includes the belief that Horace Mann and Commonwealth charter schools – public schools created by Massachusetts law, approved and reviewed by the Board and the Department of Elementary and Secondary Education, and granted a higher degree of autonomy and independence than other public schools – will stimulate the development of innovative programs within public education and advance the other purposes stated in the charter school statute. Over the last 22 years, the Legislature has repeatedly expanded the availability of charter schools by adjusting the numerical and net school funding caps set forth in G.L. c. 71, § 89(i), and there is now even greater availability in the Commonwealth's lowest performing districts.

[1] Massachusetts students have led the nation in reading and mathematics performance on the National Assessment of Educational Progress (NAEP), the "nation's report card," for the past decade. Jeremy C. Fox, *Mass. Students Are Again Tops in National Testing*, Bos. Globe, Oct. 28, 2015, at A1. Even when NAEP scores are adjusted for differences in student demographics across the states, Massachusetts remains the best performing state. Matthew M. Chingos, *Breaking the Curve: Promises and Pitfalls of Using NAEP Data to Assess the State Role in Student Achievement* (Urban Inst. Oct. 2015).

The Legislature continues to debate proposals to adjust the cap, and the Attorney General has certified a proposed question for the 2016 ballot that would do so also.

In this action, plaintiffs attempt to circumvent this debate by obtaining a judicial order striking down the charter school cap altogether. Their complaint is fundamentally defective and should be dismissed pursuant to Mass. R. Civ. P. 12(b)(1) and (6). There is no actual controversy warranting declaratory judgment because Boston, the district whose students plaintiffs seek to represent as a class, is not now at the charter school cap. Plaintiffs lack standing for the same reason, because they have not applied to many charter schools available to them, and because their theory of causation is illogical, speculative, and remote. Plaintiffs' claim under the Education Clause of the Massachusetts Constitution fails because their conclusory allegations regarding the systemic failure of Boston public schools do not state a claim, they do not plausibly allege that the charter school cap caused an Education Clause violation, and that clause commits decisions about the details of education policymaking to the legislative and executive branches, not the judiciary. Plaintiffs' claim for violation of constitutional provisions involving equal protection and due process fails because they do not allege differential treatment based on a classification, they do not allege a protected liberty or property interest, and Section 89(i) is rationally related to legitimate state interests. Because there is no legal basis for the courts to interfere with the complex legislative judgment involved in determining the scope of Massachusetts's charter school experiment, this lawsuit should be dismissed.

STATUTORY AND REGULATORY BACKGROUND

A. History of Education Reform in the Commonwealth

In 1993, the Supreme Judicial Court held that the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to provide education in the public schools for the children there enrolled. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545 (1993).

The Court took no action beyond making this declaration, expressly declining to strike down any specific legislative enactment and remanding to the single justice with the discretion to retain jurisdiction to consider whether appropriate legislative action was taken within a reasonable time. *Id.* at 621; *see also Hancock v. Comm'r of Educ.*, 443 Mass. 428, 454 (2005) (reaffirming that the Education Clause "leaves the details of education policy making to the governor and the Legislature").

Immediately following the release of the *McDuffy* decision, the Legislature enacted the Education Reform Act. *See* St. 1993, c. 71. The Act clearly stated its intent and purpose:

> It is hereby declared to be a paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children . . . the opportunity to reach their full potential and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy. It is therefore the intent of this title to ensure: (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement.

G.L. c. 69, § 1. In addition to "radically restructur[ing]" the funding of public education and "dramatically increas[ing]" state financial assistance to public schools, the Act established "uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts." *Hancock*, 443 Mass. at 432.

The Act eliminated the earlier system of funding education primarily from local property taxes, which had resulted in disparate spending levels across wealthy and poorer school districts. *Id.* at 437. The Act set a minimum "foundation budget" based on student needs, adjusted for poverty, and combined state funding with required local contributions, adjusted for district wealth, to ensure expenditures at objectively derived levels. *Id.* at 437-38 & n.8. It required the

adoption of academic standards in mathematics, science and technology, history and social science, English, foreign languages, and the arts, as well as implementation of curriculum frameworks to "present broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies and knowledge called for by these standards." *Student No. 9 v. Bd. of Educ.*, 440 Mass. 752, 755-56 (2004). For the first time, students were required to demonstrate a specified level of academic achievement in order to graduate from high school and, if unable to do so, were provided with "extensive remedial opportunities." *Hancock*, 443 Mass. at 439; *see also Student No. 9*, 440 Mass. at 757-58 (describing Massachusetts Comprehensive Assessment System (MCAS) graduation requirement). The Legislature reformed the process of training and certifying teachers by abolishing lifetime teacher licensure and imposing "stringent," objectively measured initial and renewal certification requirements designed to dovetail with the substantive academic requirements of the curriculum frameworks. *Hancock*, 443 Mass. at 441.

Included in these reforms was a centralized system of school and district accountability. *Hancock*, 443 Mass. at 438. The Legislature supplemented these accountability measures with the Achievement Gap Act of 2010 by, in part, enhancing the tools for classifying and turning around underperforming schools and districts, up to and including state receivership where necessary. *See* St. 2010, c. 12; G.L. c. 69, §§ 1J, 1K. In accordance with this authority and on the basis of student performance on standardized tests, the Commissioner of the Department of Elementary and Secondary Education (Commissioner) categorizes the lowest-performing 20% of local schools as Level 3 schools. *See* G.L. c. 69, § 1J(a).[2] Considering data such as student

[2] *See also* Mass. Dep't of Elementary & Secondary Education, Framework for District Accountability & Assistance (Aug. 2012), available at http://www.mass.gov/edu/docs/ese/accountability/framework.pdf. All facts set forth herein may be considered in connection with the Commonwealth defendants' motion to dismiss under Mass. R. Civ. P. 12(b)(1) without converting it into a motion for summary judgment.

attendance and rates of dismissal, exclusion, promotion, and graduation, the Commissioner may classify some number of Level 3 schools as "underperforming" or Level 4 schools. *See id.*; 603 C.M.R. § 2.05(2). The superintendent of a district with a Level 4 school must prepare a "turnaround plan" for that school with input of local stakeholders and state agencies and the approval of the Commissioner. *See* G.L. c. 69, § 1J(b), (c); 603 C.M.R. § 2.05(5). Such turnaround plans may include changes in curriculum, funding, length of school day or year, personnel, and collective bargaining agreements. *See* G.L. c. 69, § 1J(d). The Department of Elementary and Secondary Education (Department) provides assistance to Level 4 schools in their self-assessment efforts as well as professional development opportunities and accountability monitoring. 603 C.M.R. §§ 2.03(6), 2.05(4). Level 4 schools have access to additional partnering and supports through the Department's District and School Assistance Centers.[3]

A Level 4 school that fails to show significant improvement after implementation of the superintendent's turnaround plan may be designated a "chronically underperforming" or Level 5 school. G.L. c. 69, § 1J(a); 603 C.M.R. § 2.06(2)(a). In that event, the Commissioner prepares a turnaround plan that may include changes to the collective bargaining agreement and also may appoint an external receiver. G.L. c. 69, § 1J(m), (o), (r).[4] In addition to the assistance previously discussed, the Department may send targeted assistance teams into the schools. *Id.*

Watros v. Greater Lynn Mental Health & Retardation Ass'n, 421 Mass. 106, 109 (1995); *see also Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (court may take into account matters of public record in connection with motion to dismiss under Mass. R. Civ. P. 12(b)(6)) (citations omitted).

[3] *See* Mass. Dep't of Elementary & Secondary Education, District & School Assistance Center (DSAC) Foundational Services, Summary of Targeted Assistance Options, available at http://www.mass.gov/edu/docs/ese/accountability/dsac/foundational-services.pdf.

[4] The first legal challenges to the Commissioner's turnaround plans for Level 5 schools are pending in Superior Court. *See New Bedford Educators Ass'n v. Chair, Mass. Bd. of Elementary & Secondary Educ.*, Middlesex Sup. Ct., Civil Action No. 2014-06523-H (and consolidated cases).

§ 1J(r); 603 C.M.R. § 2.03(6).[5]

B. Charter Schools

As part of the Education Reform Act, the Legislature authorized the creation of charter schools to encourage innovative educational practices, among other purposes. *See* St. 1993, c. 71, § 55; G.L. c. 71, § 89(b), (i). All charter schools are public schools. *See* G.L. c. 71, § 89(c). Charter schools may be proposed by teachers, school leaders, parents, or non-profit entities. *Id.* § 89(d). Charter schools operate under five-year charters granted by the Board of Elementary and Secondary Education (Board). *Id.* § 89(dd). To renew a charter for an additional five years, a school must affirmatively demonstrate faithfulness to its charter, academic program success, and organizational viability. *Id.*; 603 C.M.R. § 1.11. The Board may place charter schools on probation; impose conditions on their operation; or suspend or revoke charters for violations of law or failure to make progress in student achievement, comply with their charters, or remain viable. G.L. c. 71, § 89(ee); 603 C.M.R. § 1.12.

There are two types of charter schools: Horace Mann charter schools and Commonwealth charter schools. G.L. c. 71, § 89(a), (c); 603 C.M.R. § 1.02 (Definitions). Each type is managed by a board of trustees and functions independently of the local school committee for the district in which the school is geographically located. G.L. c. 71, § 89(c); *see* 603 C.M.R. § 1.02. Employees of either type of school may organize for collective bargaining. G.L. c. 71, § 89(y).

Charters for Horace Mann schools must be approved by local school committees and, in some cases, by local collective bargaining units. *Id.* § 89(c); *see* 603 C.M.R. § 1.04(1)(a). There are three types of Horace Mann charter schools. A Horace Mann I is a new school that must be approved by the local school committee and the local collective bargaining unit. G.L. c. 71,

[5] Similar procedures are available for underperforming school districts. *See* G.L. c. 69, § 1K; 603 C.M.R. §§ 2.05(1), 2.06(1).

§ 89(c); 603 C.M.R. § 1.04(1)(a). A Horace Mann II is a conversion of an existing public school and must be approved by the local school committee and a majority of the school faculty, but not the local collective bargaining unit. *Id.* A Horace Mann III is a new school that must be approved by the local school committee but not the local collective bargaining unit. *Id.* Commonwealth charter schools are not subject to existing local collective bargaining agreements. Horace Mann charter schools are not subject to existing local collective bargaining agreements except to the extent specified in their charters and to the extent that all employees continue as collective bargaining unit members and maintain seniority, salary, and benefits. G.L. c. 71, § 89(c), (t).

Both Commonwealth and Horace Mann charter schools are funded by the school districts from which they draw students or in which they are located. 603 C.M.R. § 1.07. Horace Mann charter schools receive funding directly in a lump sum appropriated by the school committee. G.L. c. 71, § 89(w). For Commonwealth charter schools, the Department calculates tuition payments for each district sending students representing the actual amount the district would spend to educate the students. *Id.* § 89(ff). The State Treasurer pays these amounts to the schools and then reduces education and other aid payments to the sending districts by the same amounts. *Id.*; 603 C.M.R. § 1.07. The Commonwealth reimburses districts for annual increases in total charter school tuition, subject to appropriation. G.L. c. 71, § 89(gg).

Generally, under the current law, no more than 120 charter schools may be in operation in the Commonwealth at a given time. *Id.* § 89(i)(1). Of these, up to 48 may be Horace Mann I or III charter schools and up to 72 may be Commonwealth charter schools. *Id.* There is no limit on the number of public schools that may be converted to Horace Mann II charter schools. *Id.* § 89(c). Additionally, Commonwealth charters do not count toward the cap of 72 if they are

awarded to "proven providers" to establish schools in districts in the lowest 10% of student performance where enrollment would cause tuition payments to exceed 9% of the district's net school spending. *See id.* § 89(i)(1), (i)(3).

In addition to the numerical cap, the statute limits funding that may be allocated from school districts to Commonwealth charter schools. In general, no more than 9% of a district's net school spending may be directed towards Commonwealth charter schools in the form of tuition payments but, in districts with student performance in the lowest 10%, that limit has been increased over recent years such that it will reach 18% in FY 2017. *See* St. 2010, c. 12, § 7; G.L. c. 71, § 89(i)(2), (3). This funding cap does not apply to Horace Mann charter schools. *See* G.L. c. 71, § 89(i)(2); 603 C.M.R. § 1.07(1).

There are no academic requirements for admission to a charter school. G.L. c. 71, § 89(m). Students may not be charged an application fee, *id.*, and there is no limit on the number of charter schools to which students may apply. Preference for enrollment in Commonwealth charter schools is given to residents of the municipality in which the school is located and to siblings of current students. *Id.* § 89(n). Preference for enrollment in Horace Mann charter schools is given to students at the school before its conversion to a charter and to their siblings, then to students in other public schools within the district, then to other students in the district. *Id.*; 603 C.M.R. § 1.05(6), (7). If the number of applicants to a charter school exceeds the number of available spots, an admissions lottery is held. *Id.*

C. Legislative Amendments to the Charter-School Statute: 1993-present

The Legislature has amended the charter-school statute 13 times since 1993.[6] As initially

[6] St. 1995, c. 38, § 102; St. 1996, c. 72; St. 1996, c. 151, §§ 223-225; St. 1997, c. 46, §§ 2-12; St. 1997, c. 176; St. 1998, c. 99, § 5; St. 2000, c. 227, §§ 1-6; St. 2002, c. 218, § 14; St. 2004, c. 352, § 31; St. 2010, c. 12, § 7; St. 2010, c. 131, § 51; St. 2011, c. 199, § 3; St. 2014, c. 283, § 4.

enacted in 1993, the statute envisioned only one type of charter school and limited the number of such schools to 25. *See* St. 1993, c. 71, § 55. In 1997, Commonwealth charter schools and Horace Mann charter schools were defined as separate types and the numerical cap was raised to 50: 37 Commonwealth and 13 Horace Mann. St. 1997, c. 46, § 2. Also, a 6% limit on district funding allocable to charter schools was enacted. *Id.*[7] In 2000, the total number of charter schools was raised to its current level of 120 (72 Commonwealth and 48 Horace Mann). St. 2000, c. 227, § 2. At that time, the funding cap was increased to 9%. *Id.* In 2010, the funding cap was raised over seven years to 18% for charter schools in districts with student performance in the lowest 10% statewide. St. 2010, c. 12, § 7. Moreover, the Legislature required that at least four of any new Horace Mann III charters to be granted be awarded in municipalities with populations in excess of 500,000 (*i.e.*, only Boston). *Id.*[8]

Now pending is a bill filed by Governor Baker that would allow the Board to award an additional 12 Commonwealth charters each year in districts in the lowest quarter of student performance.[9] Such schools would not be subject to the funding cap, but the number of students authorized to be enrolled in them could not exceed 1% of the Commonwealth's total public school enrollment for the previous year. Moreover, the Attorney General has certified a proposed question for the 2016 ballot under Amend. Art. XLVIII of the Massachusetts Constitution that would do the same thing.[10]

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[7] The net school spending cap for any district that transferred 5% or more of its net school spending in fiscal year 1997 was the actual percent of net school spending transferred plus an additional 3%. St. 1997, c. 46, § 6.

[8] *See* http://www.massbenchmarks.org/statedata/news.htm, Appendix A.

[9] *See* https://malegislature.gov/Bills/189/House/H3804.

[10] *See* http://www.mass.gov/ago/government-resources/initiatives-and-other-ballot-questions/current-petitions-filed.html, Petition No. 15-31.

D. Current Charter School Operations

At present, 71 Commonwealth charter schools and 9 Horace Mann charter schools are operating in the Commonwealth. *Massachusetts Department of Elementary and Secondary Education, Charter Schools Fact Sheet.*[11] Twenty-five of these charter schools are in Boston: 20 Commonwealth charter schools and 5 Horace Mann charter schools. *Id.* Only 56 of the 71 Commonwealth charter schools count toward the numerical cap of 72, so 15 additional Commonwealth charters are available statewide. *Massachusetts Department of Elementary and Secondary Education, Questions and Answers About Charter Schools.*[12] And, 38 additional Horace Mann I and III charters are available statewide (with a minimum of 4 Horace Mann IIIs slated for Boston), as well as an unlimited number of charters for Horace Mann II conversion schools statewide. *Id.*; St. 2010, c. 12, § 7; G.L. c. 71, § 89(c).

Similarly, the funding cap for Commonwealth charter schools has not been reached in Boston.[13] Presently, an estimated 668 additional charter-school seats are available under the funding cap in Boston.[14]

Since 1994, the Board has received 253 charter applications and has granted 106. *Massachusetts Department of Elementary and Secondary Education, Charter Schools Fact Sheet.* Of the 106 charters granted, 24 schools are not in operation: 4 schools never opened, 9

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[11] *See* Mass. Dep't of Elementary and Secondary Educ., Mass. Charter School Fact Sheet, available at http://www.doe.mass.edu/charter/factsheet.pdf. One additional Horace Mann charter has been granted but the school is not yet operational. *Id.*

[12] *See* Mass. Dep't of Elementary and Secondary Educ., Questions and Answers About Charter Schools, at 5 (May 2015), available at http://www.doe.mass.edu/charter/new/2015-2016QandA.pdf.

[13] *See* Mass. Dep't of Elementary and Secondary Educ., Office of School Finance, FTE Remaining Under Net School Spending (NSS) Cap at Charter Maximum Enrollment as of April 2015, available at http://www.doe.mass.edu/charter/app/NSS-Projections.xlsx.

[14] *See id.*; Mass. Dep't of Elementary and Secondary Educ., Districts Subject to Increases in the Charter School Cap, available at http://www.doe.mass.edu/charter/enrollment/capincrease.html.

schools opened then closed, 4 charters were revoked, 2 charters were not renewed, and 5 charters were given up due to consolidations. *Id.* Of the 80 charter schools now in operation, 24 are less than 5 years old and 14 have been operating for 20 years. *Id.* In school year 1995-96, 2,613 students attended charter schools; in school year 2015-16, the expected number is 41,802. *Id.* Of the 80 charter schools currently in operation, 13 (or 16%) are either on probation or subject to conditions imposed by the Board. *Id.* Of the 25 charter schools currently in operation in Boston, 3 (or 12%) are either on probation or subject to conditions. *Id.*

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS.

The plaintiffs seek a judgment declaring that Section 89(i), the charter school cap, violates the Massachusetts Constitution. Before this Court can address the substance of plaintiffs' claims under the Education Clause or other provisions of the Massachusetts Constitution, plaintiffs must show (i) the existence of an actual controversy warranting a declaratory judgment and (ii) "the requisite legal standing to secure its resolution." *Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot.*, 459 Mass. 319, 326 (2011) (citation omitted). Because they can show neither, their complaint must be dismissed under Mass. R. Civ. P. 12(b)(1).

A. There Is No Actual Controversy for Resolution Because Boston Is Not at the Charter School Cap.

1. No declaratory judgment may issue in the absence of a controversy that immediately impacts plaintiffs' rights.

Declaratory judgment is a vehicle for resolving "real, not hypothetical, controversies; the declaration issued is intended to have an immediate impact on the rights of the parties." *Penal Insts. Comm'r for Suffolk Co. v. Comm'r of Corr.*, 382 Mass. 527, 530-31 (1981) (quoting *Mass. Ass'n of Indep. Ins. Agents & Brokers v. Comm'r of Ins.*, 373 Mass. 290, 292 (1977)).

Controversy in the abstract is insufficient. *See, e.g.*, *Supreme Council of the Royal Arcanum v. State Tax Comm'n*, 358 Mass. 111, 113 (1970) (holding that plaintiff seeking ruling on tax exemption lacked "definite interest" required to establish "actual controversy" where it had not and was not about to be assessed such taxes); *see also Mass. Ass'n of Afro-Am. Police, Inc. v. Boston Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992). This prohibition against abstract legal opinions "applies with special force where judgment is sought on the constitutionality of a statute." *Quincy City Hosp. v. Rate Setting Comm'n*, 406 Mass. 431, 439 (1990) (citation omitted).

Here, the five plaintiffs are residents of Boston, *see* Compl. ¶¶ 14-19, and they seek to represent thousands of other children who attend school in that city, *see id.* ¶¶ 1, 28-29. This Court should dismiss the complaint because the statute plaintiffs seek to invalidate, Section 89(i), does not have an "immediate impact" on any rights they may have. Specifically, the statute does not now limit authorization of new charter schools or charter school expansions in Boston.

2. Massachusetts is not at the numerical cap.

First, Massachusetts is not even close to the numerical cap for Horace Mann charter schools. There is no limit on the number of public schools that may be converted to Horace Mann II charter schools. G.L. c. 71, § 89(c). In addition, of the 120 charter schools that may be in operation in the Commonwealth at a given time, up to 48 of them may be Horace Mann I or III charter schools. *Id.* § 89(i)(1). Only 10 Horace Mann charter schools now operate in Massachusetts. Therefore, 38 additional Horace Mann I or III charter schools, and an unlimited number of Horace Mann II conversions, can be established in Massachusetts generally or in Boston specifically. In fact, at least 4 of the 14 Horace Mann III charter schools authorized by the Legislature in 2010 *must* be located in Boston.

Remarkably, even though the statute they seek to strike down governs both Horace Mann and Commonwealth charter schools, plaintiffs never even mention Horace Mann schools in their complaint. Instead, they refer throughout to "public charter schools" – a term not used in Section 89 or anywhere else to mean just Commonwealth charter schools. Nor do they ever identify any reason to distinguish between Horace Mann and Commonwealth charter schools for purposes of their lawsuit. The qualities that they ascribe to so-called "public charter schools" – independence from district school committees and management by a board of trustees, *see* Compl. ¶ 71; heightened review and accountability by the Department, *see id.* ¶ 72; and greater autonomy in their operations, *see id.* ¶ 73 – are shared by Horace Mann schools. Plaintiffs cannot manufacture a controversy by omitting key (and judicially noticeable) facts about the statute and program they are challenging.

Plaintiffs also give the misimpression that Massachusetts is at or near the numerical cap for Commonwealth charter schools. Specifically, they allege that there are "currently 71 public charter schools in the Commonwealth," Compl. ¶ 74, and that Section 89(i)(1) caps "the total number of Commonwealth public charter schools at 72," *id.* ¶ 87. But although it is true that 71 Commonwealth charter schools now operate in Massachusetts, *only 56* of those count toward the numerical cap of 72, leaving an additional 15 Commonwealth charters available statewide. For all these reasons, the numerical cap in Section 89(i) presents no actual controversy that would allow plaintiffs to proceed with this lawsuit.

3. Boston is not at the net school funding cap.

Nor does the net school funding cap have any immediate impact on plaintiffs' rights. *See* G.L. c. 71, § 89(i)(2), (3). The net school funding cap does not apply at all to Horace Mann I, II, or III charter schools. *See id.*, §89(i)(2); 603 C.M.R. § 1.07(1). Again, that means that, if a

sufficient number of applications are filed and all the other application and opening requirements are satisfied, 38 additional Horace Mann I or III charter schools and an unlimited number of Horace Mann II conversions could open in Boston.

At the same time, Boston is not at the net school funding cap for Commonwealth charter schools. Section 89(i) limits the funding that may be allocated from local school districts to Commonwealth charter schools but, in districts like Boston with student performance in the lowest 10% in Massachusetts, that limit has gradually increased to 18%, effective in FY 2017. *See* G.L. c. 71, § 89(i)(2), (3). Plaintiffs dance around the applicable facts in their complaint. They allege, "By early 2013, virtually all of the new charter seats permitted under the 2010 amendment already had been allocated to public charter schools and Boston had effectively reached its cap." *See* Compl. ¶ 92. But tucked away in a footnote, in small type, plaintiffs obliquely acknowledge that right now – *i.e.*, 2015 through 2017 – Boston is *not* at its funding cap, even for Commonwealth charter school seats. *See id.* ¶ 94 n.11 (referring to announcement "this year" that Massachusetts "was authorizing an additional 668 seats in Boston public charter schools"). In fact, the Department did not "authorize" an additional 668 seats, but rather applied the net school funding cap to determine that 668 more seats are available in Boston, announcing this determination in May 2015.

Because Section 89(i) does not currently limit new charter school authorizations in Boston, either through the numerical or net school funding cap, this case does not present an actual controversy and should be dismissed.

B. Plaintiffs Do Not Have Standing Because Section 89(i) Has Not Caused Them Legally Cognizable Injury.

1. Standing is required for subject-matter jurisdiction.

The complaint should also be dismissed for lack of standing. "To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981). The "complained of injury must be a direct consequence of the complained of action." *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 323 (1998) (citing *Boston Edison Co. v. Boston Redev. Auth.*, 374 Mass. 37, 44 (1977)). Far from a technicality, "[t]he question of standing is one of critical significance." *Id.* at 322 (quoting *Tax Equity Alliance v. Comm'r of Rev.*, 423 Mass. 708, 715 (1996)). That is because "[r]espect for the separation of powers has led [the Supreme Judicial Court] . . . to be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business." *Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth*, 427 Mass. 546, 548 (1998). Here, plaintiffs' "complained of action" is the continued existence of Section 89(i). The elimination of the charter school cap is "[a]ll" that they ask for. *See* Compl. ¶ 13, Prayer for Relief. But plaintiffs do not have standing to proceed with their constitutional challenges because they cannot show that the cap causes them a legally cognizable injury. This is true for several independently sufficient reasons.

2. Additional charter school seats are available in Boston.

First, as explained in Section I.A, *supra*, Section 89(i) does not limit authorization of new charter schools and expansions in Boston, where plaintiffs reside. Because Section 89(i) does not currently operate to limit plaintiffs' claimed rights, they do not have standing to challenge it as unconstitutional. *Mass. Comm'n Against Discrimination v. Colangelo*, 344 Mass. 387, 390 (1962) ("Only one whose rights are impaired by a statute can raise the question of its

constitutionality, and he can object to the statute only as applied to him.") (citation omitted).

3. Plaintiffs have not applied to many charter schools available to them.

Second, even if Boston were at the cap, the complaint makes clear that plaintiffs have not taken full advantage of the charter school application opportunities available to them. Plaintiffs allege that, "[f]aced with the prospect of attending a constitutionally inadequate school, each of the plaintiffs applied to attend *a* public charter school in the hopes of obtaining at least an adequate education." Compl. ¶ 68 (emphasis added). John Does No. 1 and 2 and Jane Doe No. 1 each applied to only a single charter school. *Id.* ¶¶ 15-17. John Doe No. 3 and Jane Doe No. 2 allege that they applied to "multiple public charter schools," but do not specify the number or identify any of those schools. *Id.* ¶¶ 18-19.[15] There is no rule that a child may apply to only one or a few charter schools. To the contrary, there are 5 Horace Mann and 20 Commonwealth charter schools located in Boston, and as residents plaintiffs are entitled to apply to *every one* that serves their respective grade levels. They can also apply to charter schools located outside of Boston, although they would not receive enrollment preferences set forth in G.L. c. 71, § 89(n).

Plaintiffs cannot proceed with a lawsuit based on the idea that they were denied access to a government program or benefit they did not fully apply for. Nor may plaintiffs proceed on the theory that they are subjected to "reduced," "diminished," or "depressed" chances at gaining admission to charter schools, *see* Compl. ¶¶ 1, 7, 108, where they themselves reduced those odds by not applying to all charter schools available to them. They have not plausibly alleged that Section 89(i) has caused their claimed injury of not being admitted to a charter school. *See*

[15] Nor is there any indication that plaintiffs have pursued any other alternative available to them under state law, such as enrolling in another district under the Inter-District School Choice program or applying to the METCO program. *See* Mass. Dep't of Elementary and Secondary Educ., Choosing a School: A Parent's Guide to Educational Choices in Massachusetts, available at http://www.doe.mass.edu/finance/schoolchoice/choice_guide.html.

Ginther, 427 Mass. at 323 (claimed injury must be "direct consequence" of challenged action).

4. Plaintiffs' theory of causation is illogical, speculative, and remote.

Third, even if Boston were at the cap for both Horace Mann and Commonwealth charter schools and plaintiffs had applied to all available schools, they would still lack standing to proceed because the causal link between the existence of the charter school cap and the "constitutionally inadequate education" that plaintiffs allegedly receive (or would receive, if they attended their assigned public school), *see, e.g.*, Compl. ¶ 14, is illogical, highly speculative, and remote. Plaintiffs allege in conclusory fashion that the harm they have suffered is "caused by the arbitrary cap on public charter schools," *see, e.g.*, *id.* ¶ 21, but they never explain how the cap caused their public schools to be constitutionally inadequate. Nor can they plausibly do so. Simply put, the conditions at one school are not caused by the existence or absence of other schools. Numerous other factors, unaddressed in plaintiffs' complaint, are responsible for underperforming schools. Because plaintiffs' "complained of injury" is not a "direct consequence of the complained of action," *Ginther*, 427 Mass. at 323, their complaint must be dismissed. *See also New England Div. of Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 177 (2002) (standing requires plaintiffs to show that harm they suffer is "fairly traceable" to action they are challenging).

In addition, any theory of causation that plaintiffs might articulate is "speculative, remote, and indirect" and "insufficient to confer standing." *Ginther*, 427 Mass. at 323. For example, they allege that, "[b]ut for the charter school cap, more high-quality public charter schools could open in Boston, allowing many more children to attend these schools." Compl. ¶ 93. That allegation does not establish the requisite causal link between violation and injury. Furthermore, it is purely speculative to assume that eliminating the cap would result in more

high-quality charter schools in Massachusetts. An extended chain of contingencies would have to occur for that assumption to come true. Potential charter school operators would have to apply. They would have to satisfy the demanding application and review process. Even if approved, the prospective operators would have to draft bylaws for the Board of Trustees; secure financing and an appropriate facility; hire teachers and other employees and conduct background checks; develop a budget; formalize a broad range of policies and procedures; obtain insurance coverage; and implement enrollment and admission policies. It is purely speculative to claim that a significant number of new charter schools would satisfy all these required steps. Furthermore, there is no guarantee that, once a new charter school opened, it would be a "high-quality" charter school as plaintiffs allege. *See id.* Not all charter schools in Massachusetts are high-performing. In fact, it is not unusual for the Department or the Board to impose conditions on existing charter schools, or close them because they do not perform as required.[16]

The Supreme Judicial Court has repeatedly rejected claims of standing based on such hypothetical or attenuated reasoning. *See Pugsley v. Police Dep't of Boston*, 472 Mass. 367, 371-72 (2015) (rejecting standing that rested on "an allegation that an injury *might* have occurred if a series of events transpired in a certain way"); *Arbella Mut. Ins. Co. v. Comm'r of Ins.*, 456 Mass. 66, 84 (2010) (rejecting standing where plaintiff "alleged only speculative harm"); *Barbara F. v. Bristol Div. of Juvenile Court Dep't*, 432 Mass. 1024, 1025 (2000) (rescript) (rejecting standing where plaintiff feared that she might engage in insufficient prenatal care and thereby be subjected to prosecution by same district attorney who prosecuted another pregnant woman); *Slama*, 384 Mass. at 625 (finding "the city's allegation of injury is insufficient" where it assumed that initiative petition would be approved if it appeared on ballot). Because plaintiffs

[16] Thirteen of the 80 charter schools currently in operation in Massachusetts are either on probation or operating under conditions imposed by the Board. Twenty-four charter schools have closed since 1997.

cannot show that the charter school cap has caused them injury and because their theories of causation are illogical and hopelessly attenuated, their complaint should be dismissed for lack of jurisdiction.

II. PLAINTIFFS' EDUCATION CLAUSE CLAIM MUST BE DISMISSED.

Plaintiffs' claim that the Commonwealth has forsaken its duty under the Education Clause to provide an education to children in the Boston public schools must be dismissed as legally deficient. *See* Compl. ¶¶ 107-10. Plaintiffs allege only one, exceptionally narrow, theory as to how the Commonwealth has failed to fulfill its duty: They contend that the Commonwealth has violated the Education Clause by limiting the number of Commonwealth charter schools. *Id.* ¶¶ 108-09. To fix that purported violation, plaintiffs request only one, exceptionally narrow, remedy: They ask this Court to invalidate Section 89(i), and thereby permit the creation of an unlimited number of Commonwealth charter schools. *Id.* ¶¶ 13, 110, Prayer for Relief.

This theory of liability and proposed remedy fail for three reasons. First, plaintiffs' allegations regarding the systemic failure of Boston public schools are so conclusory that they fail to state a claim. Second, plaintiffs' only theory of causation – that the Commonwealth has caused Boston schools to be constitutionally inadequate by limiting the number of Commonwealth charter schools – is so implausible that it fails to allege the causation element of the claim. Finally, even if plaintiffs could establish that the Commonwealth is failing to provide them with an education, this Court would lack authority to order the fine-grained remedy plaintiffs desire. Both the text of the Education Clause and the separation-of-powers principles codified in Article XXX of the Declaration of Rights commit decisions about the nuances of education policy to the legislative and executive branches, not the judiciary.

A. Plaintiffs Fail to Allege the Essential Elements of an Education Clause Claim.

To state an Education Clause claim, plaintiffs must allege the "abandonment of the constitutional duty" to *generally* provide the Commonwealth's students with an education. *Hancock*, 443 Mass. at 433, 454 n.27. They must also identify some state action or omission that has plausibly caused public schools to be constitutionally deficient. *See McDuffy*, 415 Mass. at 611. Furthermore, to survive a motion to dismiss under Rule 12(b)(6), plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level" and "plausibly suggest[] . . . an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citation and internal quotation marks omitted). "[W]holly conclusory statement[s]" and "bare assertion[s]" that the Commonwealth has violated the Education Clause are insufficient to state a claim. *Id.* at 632, 636.

1. Plaintiffs do not plausibly allege general deprivation of the right to education.

Plaintiffs fail to state a claim under the Education Clause because they have not plausibly alleged the systemic deprivation of the right to an education. It is well established that the "enjoyment of [the] benefit of education" secured by the Education Clause "is [a] common right and not an exclusive personal one." *Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 117, 132 (1995) (citing *Sherman v. Inhabitants of Charlestown*, 62 Mass. 160, 8 Cush. 160, 163-64 (1851)); *see also id.* at 129 (while "the Commonwealth *generally* has an obligation to educate its children," the Education Clause does not "guarante[e] each individual student the fundamental right to an education"); *Hancock*, 443 Mass. at 454 n.27. Thus, in order to state an Education Clause claim, plaintiffs must allege the systemic deprivation of the right to an education.

Plaintiffs fail to meet this basic pleading burden. Nearly all of their specific allegations

bear on individual educational circumstances, rather than on the general provision of public education. Plaintiffs allege that they, personally, attend inadequate public schools, although they do not identify the schools they attend. *See* Compl. ¶¶ 49, 52, 56, 60, 64. They allege that the MCAS passage rates in their schools are low, *see id.* ¶¶ 50, 53, 57, 61-62, 65, and that their schools are Level 3 or Level 4 schools, *see id.* ¶¶ 51, 55, 59, 63, 66. They also allege that their schools "fail[] to teach children many of the skills . . . identified in *McDuffy* . . . as the hallmarks of a minimally adequate education." *Id.* ¶ 67. These allegations do not support an Education Clause claim. Because the "benefit of public education is [a] common, not exclusive personal, right," a plaintiff cannot make out a constitutional claim by alleging that his or her particular school is inadequate. *See Hancock*, 443 Mass. at 454 n. 27; Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 Cal. L. Rev. (forthcoming 2016), at 37 ("No court has ever recognized a claim against the state based on isolated inadequacies or inequalities.").

Elsewhere, plaintiffs allege that students in Boston "attend constitutionally inadequate schools" or "attend district schools that do not provide a constitutionally adequate education." Compl. ¶¶ 5, 41; *see also id.* ¶¶ 1, 6, 9, 11-12, 14-21, 28, 30, 36, 40, 42, 48, 68, 102. Although these allegations bear on the general provision of public education, they are wholly conclusory, and therefore must be disregarded in determining whether plaintiffs have adequately pleaded an Education Clause violation. *See Iannacchino*, 451 Mass. at 636 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions."); *Schaer*, 432 Mass. at 477 (this Court may "not accept legal conclusions cast in the form of factual allegations").

What remains of the complaint are three allegations that indict local public schools in general. Plaintiffs allege that 17 schools in Boston have been designated Level 4 schools since

2010, and that of the 12 that were designated Level 4 schools in 2010, half have shown little to no improvement. Compl. ¶¶ 42-43. In addition, plaintiffs allege that 59 schools across the Commonwealth have been designated Level 4 schools since 2010. *Id.* ¶ 44.

These allegations do not give rise to a plausible Education Clause claim. As an initial matter, the classification of schools as Level 3 or Level 4 is not a proxy for constitutional inadequacy. The Department classifies schools by level in order to identify those schools most in need of state engagement and accountability measures. By designating a school as Level 4, the Commissioner enables the school to receive a turnaround plan, benefit from more extensive intervention from the Commonwealth, and reopen collective bargaining. *See* 603 C.M.R. § 2.05(5). But the Level 4 designation is not an admission that the school or school district has "abandon[ed] . . . the constitutional duty" to provide an education to its pupils. *Hancock*, 443 Mass. at 433. Nor, of course, is the Level 3 designation, as some schools will always fall into the bottom 20% of local public schools statewide. This Court should not allow plaintiffs to exploit the Department's accountability tools, such as classification of schools, to subject the Commonwealth to burdensome discovery and litigation on thinly-pled Education Clause claims.

In any event, the allegation that 17 public schools in Boston have been classified as Level 4 since 2010 says little about the state of Boston public schools in general, which, in 2013-14, comprised 128 local public schools. As plaintiffs admit, "excellent district schools exist in Boston." Compl. ¶ 42. Similarly, the allegation that 59 schools statewide have been classified as Level 4 says little about the state of the 1,860 public schools statewide. Indeed, the 6.25%[17] of public schools in Boston currently designated Level 4 is lower than the 12% of charter schools

[17] There are currently eight Level 4 schools in Boston, out of 128 total. *See* Level 4 Schools in Massachusetts (Sept. 2014), available at http://www.mass.gov/edu/docs/ese/accountability/turnaround/level-4-schools-list.pdf.

in Boston (and 16% of charter schools statewide) currently on probation or operating under conditions imposed by the Board. Thus, at most, plaintiffs' allegations indicate that the Department has identified some local public schools in need of significant improvement and state support. But they do not allege the kind of "egregious, Statewide abandonment of the constitutional duty" to provide an education that gave rise to the Education Clause claim in *McDuffy*. *Hancock*, 443 Mass. at 433. And far from abandonment, under the 2010 Achievement Gap Act, St. 2010, c. 12, the Commonwealth now has a robust, mandatory program to "turn around" these schools. Accordingly, plaintiffs have failed to state a claim under the Education Clause, and Count I must be dismissed

2. Plaintiffs fail to plausibly allege state action that has caused a violation of the Education Clause.

Plaintiffs also fail to plausibly allege that the Commonwealth has *caused* a constitutional injury. To state a viable Education Clause claim, plaintiffs must identify some state action – a policy or "'law and the actions undertaken pursuant to that [policy or] law'" – that plausibly "'conflict[s] with [or falls short of]'" constitutional requirements. *McDuffy*, 415 Mass. at 611 (quoting *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 55 (1979)); *see also* Black, *The Constitutional Challenge to Teacher Tenure*, *supra*, at 39 ("[P]laintiffs must pinpoint a state policy that has causal effects at the local level. It is not enough to simply allege an education deficiency."); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 631 (2004) ("[I]t is one thing for plaintiffs to demonstrate that a large number of . . . students are failing to obtain a sound, basic public education. It is quite another for plaintiffs to show that such a failure is primarily the result of action and/or inaction of the State."). Thus, in *McDuffy*, the plaintiffs alleged, and the Supreme Judicial Court ultimately concluded, that the state laws governing school financing effected the constitutional deprivation. *See* 415 Mass. at 556-57; *id.* at 614 ("[F]iscal support, or

the lack of it, has a significant impact on the quality of education each child may receive.").

Plaintiffs here identify only one state law – Section 89(i) – that, they allege, has caused the deprivation of a right to an education. *See* Compl. ¶¶ 103-05, 108-10. But the notion that, by restricting the number of charter schools, the Commonwealth has caused local public schools to be constitutionally inadequate, is too facially implausible to state a claim. Plaintiffs advance no theory as to how the statute has any negative impact whatsoever on local public schools. Section 89(i) is the obstacle to plaintiffs' desired policy (*i.e.*, more charter schools); it is not a credible cause of the alleged constitutional deficiencies in Boston public schools. Because plaintiffs have failed to pinpoint any plausible state action that has caused the alleged inadequacy of Boston public schools, Count I must be dismissed.

B. This Court Lacks Authority Under the Education Clause to Order the Specific Remedy That Plaintiffs Request.

Count I must also be dismissed because this Court cannot order the sole remedy plaintiffs request. The role of the judiciary in reviewing an Education Clause claim is circumscribed: It must only determine whether "'a law and the actions undertaken pursuant to that law conflict with [or fall short of]'" constitutional requirements. *McDuffy*, 415 Mass. at 611 (quoting *Colo*, 378 Mass. at 553). Thus, in *McDuffy*, the Supreme Judicial Court "declared . . . the nature of the Commonwealth's duty to educate its children" and then "concluded the current state of affairs [fell] short of the constitutional mandate." 415 Mass. at 619 n.92. But once the court determined that the Commonwealth had not discharged its duty, it refrained from ordering a specific remedy. Instead, it presumed "that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education," and "le[ft] it to the magistrates and Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty." *Id.* at 619 n.92, 620; *see also*

id. at 610-11 ("[I]t is generally within the domain of the 'legislatures and magistrates' to determine how they will fulfil their duty under [the Education Clause].").

Twelve years later, in *Hancock*, the Supreme Judicial Court declared more emphatically the limits on the judiciary's authority to order specific Education Clause remedies. The Education Clause, the court confirmed, "leaves the details of education policymaking to the governor and the Legislature." *Hancock*, 443 Mass. at 454; *accord id.* at 466-69 (Cowin, J., concurring). The judiciary may not order specific policy remedies like preschool for at-risk children, nutritional and drug counseling programs, or programs that involve parents in school affairs. *Id.* at 460. Such remedies are "fundamentally political," the court explained, and are "policy decision[s] for the Legislature." *Id.*; *see also McDuffy*, 415 Mass. at 610-11, 619-20 & n. 92; *Bates v. Dir. of Office of Campaign & Political Fin.*, 436 Mass. 144, 168-69 (2002) ("While "[i]t is the 'imperative duty' of the judicial branch of government to say what the Constitution requires, . . . [n]ot every violation of a legal right gives rise to a judicial remedy.").

Hancock identified two reasons for its conclusion that the Education Clause prohibits the judiciary from ordering specific remedies. First, the text of the Education Clause commits decisions about education policymaking to the legislative and executive branches. *See Hancock*, 443 Mass. at 456 n.30; *id.* at 466 (Cowin, J., concurring). The Clause makes it "the duty of legislatures and magistrates" – not the judiciary – to provide an education to the Commonwealth's children. Mass. Const. Part II, c. 5, § 2. By "conspicuously omitting any reference to the judicial branch," the drafters of the Education Clause "explicitly conferred authority on only two of the branches of government" to "determin[e] the form and scope of [the Education Clause's] obligations." *Hancock*, 443 Mass. at 466 (Cowin, J., concurring).

Second, the doctrine of separation of powers, codified in Article XXX of the

Massachusetts Declaration of Rights, "prohibits judicial intervention in otherwise discretionary functions of the executive and legislative branches." *Id.* at 466 (Cowin, J., concurring). "[I]n separating judicial functions from legislative and vice versa," the Massachusetts Constitution "restricts policymaking to its intended branch." *Id.* at 472. The judiciary therefore may not order Education Clause remedies grounded in "policy choices that are properly the Legislature's domain." *Id.* at 460; *see also Care & Protection of Isaac*, 419 Mass. 602, 606-07 (1995) ("Where the means of fulfilling [an] obligation is within the discretion of a public agency, the courts normally have no right to tell that agency how to fulfil its obligation.") (citation omitted).

There is good reason for this rule: Courts are ill-suited to make judgments about what types of schools best boost student achievement and prepare students to become engaged citizens. As Justice Cowin explained:

> Unlike State legislators and their staffs, judges have no special training in educational policy or budgets, no funds with which to hire experts in the field of education, no resources with which to conduct inquiries or experiments, no regular exposure to our school system, no contact with the rank and file who have the task of implementing our lofty pronouncements, and no direct accountability to the communities that house our schools.

Hancock, 443 Mass. at 472 (Cowin, J., concurring). Furthermore, if the judiciary could order specific remedies, elected officials, who "ought to bear the ultimate burden of resolving our current educational debate," would be improperly "insulated from public accountability." *Id.*

Because the Education Clause "leaves the details of education policymaking to the governor and the Legislature," *Hancock*, 443 Mass. at 454, this Court lacks the authority to order the specific remedy plaintiffs request, even if they could prove that the Commonwealth is failing to provide an education to Boston public school students. Plaintiffs' Education Clause claim is premised entirely on one particular policy – invalidating the limitations on Commonwealth charter schools – that, plaintiffs contend, will remedy the alleged constitutional inadequacy of

Boston's public schools. *See* Compl. ¶¶ 107-10. Under *Hancock* and *McDuffy*, however, that is precisely the type of remedy that the Education Clause commits exclusively to the Legislature and Governor. Like an order requiring universal preschool, an order requiring the Legislature to authorize more charter schools would "embod[y] a value judgment" that is "fundamentally political." *Hancock*, 443 Mass. at 460; *cf. Hoke Cnty. Bd. of Educ.*, 358 N.C. at 645 (reversing order requiring state to provide pre-kindergarten because of the court's "limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain").

This Court need look no further than the day's top headlines to conclude that the question whether the Legislature should authorize more charter schools is a specific, "fundamentally political," policy question, outside the remedial scope of an Education Clause claim. *Hancock*, 443 Mass. at 460. Currently pending before the Legislature are 34 bills related to charter schools, including a measure proposed by Governor Baker that would allow the Board to license up to 12 new Commonwealth charter schools each year in districts that perform in the lowest 25% of districts statewide.[18] And the Attorney General recently certified an initiative petition that would likewise authorize additional charter schools in Massachusetts. Indeed, if this lawsuit is not dismissed, any number of lawsuits premised on obtaining desired education policies could be filed. Opponents of charter schools could allege that Section 89(i) violates the Education Clause by *allowing* up to 120 charter schools that draw resources from local public schools. Other advocates could seek an order requiring universal preschool, higher teacher salaries, or longer school days. The framers of the Education Clause recognized that these policy proposals

[18] *See* Jeremy C. Fox, *Baker Eyes New Charter Schools*, Bos. Globe, Oct. 9, 2015, at A1; Katie Lannan & Andy Metzger, *Charter Debate Punctuated with Study, Poll Results*, State House News Serv., Oct. 13, 2015.

are best evaluated through democratic processes, not through the courts. *See Hancock*, 443 Mass. at 460; *id.* at 466-69 (Cowin, J., concurring).

For these reasons, this Court lacks authority under the Education Clause to invalidate the charter school growth strategy adopted by Section 89(i), even if plaintiffs could establish that the Commonwealth is not fulfilling is duty to provide them with an education. And because plaintiffs' entire Education Clause claim is premised on obtaining that one predetermined remedy, the claim fails as a matter of law and must be dismissed.

III. PLAINTIFFS' CLAIM FOR VIOLATION OF EQUAL PROTECTION OR DUE PROCESS MUST BE DISMISSED.

In Count II of their Complaint, plaintiffs claim that the charter school cap infringes their rights under various provisions of the Massachusetts Constitution involving equal protection of the laws and due process. *See* Compl. ¶ 116 (referring to "the Massachusetts Declaration of Rights, Arts. I, VI, VII, X, and XII, and Part II, Chapter 1, § 1, Art. 4 of the Massachusetts Constitution");[19] *see also id.* ¶ 12 (referring to "the Equal Protection, Due Process, and Liberty Clauses . . . of the Massachusetts Constitution"). Plaintiffs do not say whether they rely on an equal protection theory, a due process theory, or some combination of the two. Although the legal tests are closely related, *see Gillespie v. City of Northampton*, 460 Mass. 148, 153 (2011), in the interest of clarity, defendants address the defects underlying each theory separately.

A. Plaintiffs Have No Claim for Violation of Equal Protection of the Laws.

1. Plaintiffs fail to allege differential treatment based on a classification.

"Classification, and differing treatment based on a classification, are essential components of any equal protection claim, Federal or State." *Doe v. Acton-Boxborough Reg'l*

[19] Article I of the Massachusetts Constitution has been annulled and replaced with Amendment Article CVI. *See Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 662 (2011).

Sch. Dist., 468 Mass. 64, 75 (2014) (citations omitted); *see also Matter of Corliss*, 424 Mass. 1005, 1006 (1997) (rescript) ("One indispensable element of a valid equal protection claim is that individuals who are similarly situated have been treated differently.") (citations omitted). Plaintiffs fail to allege these essential components here.

First, the amorphous classifications employed by plaintiffs – children in "more affluent" and "less affluent" communities or school districts, *see, e.g.*, Compl. ¶¶ 113-14 – "cannot be identified or defined in customary equal protection terms." *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973); *accord Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding that Equal Protection claim requires that state legislature selected course of action because of "its adverse effects upon an identifiable group"). Plaintiffs have pleaded no substantive characteristics that would allow this Court to separate children into discrete groupings or clearly identify those children who have suffered the alleged discrimination and those who have not.

Second, even if plaintiffs were members of an identifiable group subject to Equal Protection analysis, they fail to show that the charter school cap in Section 89(i) treats that group worse than any other. In their complaint, plaintiffs assert that the charter school cap "arbitrarily subjects similarly situated children in the Commonwealth to disparate treatment" by "forcing children in less affluent communities into a lottery for an adequate education that children in more affluent communities need not confront," *see* Compl. ¶¶ 112, 115, but such conclusory allegations are insufficient to establish a plausible entitlement for relief, *see Iannacchino*, 451 Mass. at 636. In reality, Section 89(i) does not "force" anyone to do anything. Nor does it discriminate against "children in less affluent communities" in any manner. Under Section 89, charter schools are open to all Massachusetts students, with enrollment preference given to

students in the district or region where the school is located. Charter schools may be established in any community in the Commonwealth, regardless of its affluence. The law does not provide any preference to "more affluent communities" or communities with what plaintiffs term "adequate public schools," and there is no allegation that defendants or any other state officials have applied the law in such a manner.

In fact, the only preference set forth in Section 89(i) favors the lowest performing school districts in the Commonwealth. As plaintiffs acknowledge elsewhere in their Complaint, *see* Compl. ¶¶ 88-89, in 2010 the Legislature amended this provision to increase the cap on district net school funding: starting at 6% and increasing in incremental steps to a maximum of 18%. This cap lift applies only to districts where academic performance is in the lowest 10% of the state. G.L. c. 71, § 89(i)(3). Thus, to the extent plaintiffs equate "less affluent communities" with the prevalence of "constitutionally inadequate" schools," *see, e.g.*, Compl. ¶ 114, Section 89(i)'s preference in favor of the Commonwealth's lowest performing school districts demonstrates that there is no basis for their claim that the statute unconstitutionally discriminates against "children in less affluent communities."

Plaintiffs allege that the funding increases allowed under Section 89(i) for Massachusetts's lowest performing school districts have not met "demand for public charter school admissions in Boston," *see* Compl. ¶ 91, but that allegation does not establish a claim for differential treatment. First, plaintiffs do not make any allegation regarding whether the availability of charter schools is sufficient to meet the demand in other communities. Second, and more fundamentally, equal protection does not require government to distribute programs or services commensurate to the alleged demand in different communities. "The guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from

invidious discrimination in statutory classifications and other governmental activity." *Acton-Boxborough Regional Sch. Dist.*, 468 Mass. at 82 (quoting *Harris v. McRae*, 448 U.S. 297, 322 (1980)); *see also Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (no equal protection claim where regulation allegedly "results in some disparity in grants of welfare payments to the largest AFDC families"). Because Section 89(i) does not discriminate against plaintiffs or their communities in any manner – but, rather, provides for greater charter school resources to districts with the lowest performing schools – plaintiffs have no claim for denial of equal protection.

2. Section 89(i) is rationally related to legitimate state interests.

Even if plaintiffs had properly alleged that Section 89(i) subjects them to differential treatment, their claim would be subject to dismissal because the statute is rationally related to legitimate state interests. The standard for reviewing equal protection claims is well established: statutes that "neither burden a fundamental right nor discriminate on the basis of a suspect classification . . . are subject to a rational basis level of judicial scrutiny." *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 669 (2011) (citations omitted); *accord Commonwealth v. Freeman*, 472 Mass. 503, 505-06 (2015) (citations omitted). Here, there is no fundamental right or suspect classification. In Count II, plaintiffs assert that the Commonwealth "has ultimate responsibility for the education of all children" under the Education Clause, *see* Compl. ¶ 112, but the Supreme Judicial Court has specifically ruled that children do not have a fundamental right to an education under that provision. *Superintendent of Schs. of Worcester*, 421 Mass. at 129-30. Nor do plaintiffs allege discrimination based on a suspect classification. As discussed, the classification in which plaintiffs claim ownership – children in "less affluent" communities – resists equal protection analysis altogether because it does not allow for the ready identification of other class members. *See* Section III.A.1, *supra*.

Even if it did, it is not one of the classifications enumerated in Amendment Article CVI (sex, race, color, creed, or national origin) for which strict scrutiny is required, *see Finch*, 459 Mass. at 662; and neither federal nor Massachusetts courts have found that the relative affluence of a community is a suspect classification for purposes of equal protection, *cf. San Antonio Indep. Sch. Dist.*, 411 U.S. at 28-29. Rational basis review therefore applies.

"Those who challenge the constitutionality of a statute that burdens neither a suspect group nor a fundamental constitutional right bear a heavy burden in overcoming the presumption of constitutionality in favor of the statute's validity." *Commonwealth v. Caetano*, 470 Mass. 774, 781 (2015) (*citing English v. New England Med. Ctr., Inc.*, 405 Mass. 423, 427 (1990)). The statute "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Gillespie*, 460 Mass. at 158 (citations and internal quotation marks omitted). The legislature need not actually articulate the purpose or rationale supporting its classification, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted), and "it is irrelevant for constitutional analysis whether a reason now advanced in support of a statutory classification is one that actually motivated the Legislature," *Prudential Ins. Co. of Am. v. Comm'r of Revenue*, 429 Mass. 560, 568 (1999) (citation omitted).

Here, the charter school cap is unquestionably related to legitimate state interests. Charter schools are a creation of the Legislature, and the Legislature has a rational interest in delineating the institutions it creates. This is particularly true given that one of the many purposes of charter schools is to develop and encourage innovation in public education. It is rational for the growth of charter schools to be controlled by statute, so that any innovative methods that are developed by these schools can be properly assessed, managed, and directed for effective reproduction in local public schools. It is similarly rational for the Legislature to limit

the extent to which some types of charter schools may depart from longstanding practices involving collective bargaining and the exercise of control over elementary and secondary education by local school committees. Section 89(i) rationally allocates funding across school types, balancing the goal of innovation in education and the desire for greater alternatives in low-performing districts with the need to maintain adequate resources for schools that have traditionally educated children in the district. The statute also allocates the Department's resources in a manner that limits the intensive work involved in evaluating charter applications and monitoring charter schools' performance, including those on probation or operating subject to conditions.

Plaintiffs allege that the charter school cap "imposes an arbitrary limit on the growth of public charter schools which bears no relation to any legitimate educational goal." *See* Compl. ¶ 103; *see also id.* ("The charter cap dispenses with any legitimate education-related criteria in favor of a flat cap on public charter school growth that is unrelated and extrinsic to any educational purpose."). But that is the wrong question: rational basis review requires a relationship to any legitimate state interest, including interests involving the allocation of public funds and administrative convenience. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987) ("The challenged amendment unquestionably serves Congress' goal of decreasing federal expenditures."); *Dandridge*, 397 U.S. at 487 (distribution of limited public funds is legitimate state interest in case challenging allocation of welfare payments); *Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Bd. of Educ.*, 436 Mass. 763, 778 (2002) ("Distinctions between individuals made in the interests of practicality and administrative convenience are permissible and rational purposes for legislation.") (citation omitted). To proceed with their challenge, plaintiffs must "negative every conceivable basis which might support [the cap]," including

bases unrelated to education policy. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012) (citations omitted). Plaintiffs cannot do this for the myriad state interests served by the charter school cap.

Indeed, the legislative line-drawing involved in enacting and amending Section 89(i) makes it particularly resistant to a constitutional challenge premised on an allegation of arbitrariness. "Legislators may enact complex compromises when addressing novel social and economic issues, and it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 214 (1st Cir. 2002) (citation and internal quotation marks omitted). The fact that the line might have been drawn differently – or, indeed, might be drawn differently in the future – "is a matter for legislative, rather than judicial, consideration." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) (need for line-drawing "renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally"); *Harlfinger v. Martin*, 435 Mass. 38, 48 (2001) (legislative line drawing "does not violate equal protection principles simply because it is not made with mathematical nicety or because in practice it results in some inequality") (citations and internal quotation marks omitted). The principle includes the fact that a legislature may deal with social problems "one step at a time," addressing first those aspects "most urgently requiring remedial action." *Opinion of the Justices*, 423 Mass. 1201, 1233 (1996) (citations and internal quotation marks omitted); *see also Mass. Fed'n of Teachers*, 436 Mass. at 778, and cases cited therein. For all of these reasons, plaintiffs' equal protection claim should be dismissed.

B. Plaintiffs Have No Claim for Violation of Substantive Due Process.

For similar reasons, any claim that plaintiffs may assert for violation of substantive due process must also be dismissed. "Substantive due process prohibits the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *Meyer v. Town of Nantucket*, 78 Mass. App. Ct. 385, 392 (2010) (citations omitted). When a statute impinges on the exercise of a fundamental right, courts apply strict judicial scrutiny. *Gillespie*, 460 Mass. at 153. All other statutes are subject to a "rational basis" standard of judicial review. *Id.* (citation omitted). "Under the rational basis standard, a statute is constitutionally sound if it is reasonably related to the furtherance of a valid State interest." *Id.* (citation omitted); *see also Doe v. Sex Offender Registry Bd.*, 447 Mass. 750, 759-61 (2006) (finding no substantive due process violation where statute and regulation had "a reasonable relation to a permissible legislative objective"). The Supreme Judicial Court has ruled that because children do not have a fundamental right to an education under the Education Clause, courts must "apply the lowest level of scrutiny, the rational basis test," to substantive due process claims alleging intrusions on educational activity. *Superintendent of Schs. of Worcester*, 421 Mass. at 129-32.

The charter school cap in Section 89(i) is reasonably related to valid state interests. The statute reasonably balances the goal of fostering innovation in public education with the risk inherent in approving new educational institutions and the high costs associated with evaluating charter applications, monitoring charter schools' performance, and assessing the value of new educational practices that they develop. Section 89(i) also recognizes the state's important interests in maintaining some degree of local control over elementary and secondary education, the collective bargaining rights of public employees, and the longstanding tradition of municipal

public schools.

Throughout their complaint, plaintiffs criticize Section 89(i) on policy grounds, describing it, for example, as an "arbitrary and unnecessary barrier" and "extrinsic to any educational purpose." *See, e.g.*, Compl. ¶¶ 1, 103. But plaintiffs' disagreement with the Legislature's rationale for enacting and amending Section 89(i) over the years does not give rise to a claim that it violates the Constitution. Allowing plaintiffs to proceed with this claim would create "an unacceptable danger of this court's substituting its judgment for that of the Legislature." *Blue Hills Cemetery, Inc. v. Bd. of Regis. in Embalming & Funeral Directing*, 379 Mass. 368, 375 (1979); *see also Sperry & Hutchinson Co. v. McBride*, 307 Mass. 408, 418 (1940) ("It is not for us to inquire into the expediency or the wisdom of the legislative judgment. Unless the act of the Legislature cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down as violative of the Constitution."). Any substantive due process claim that plaintiffs may assert should therefore be dismissed.

C. Plaintiffs Have No Claim for Violation of Procedural Due Process.

Finally, if plaintiffs are asserting a claim for violation of procedural due process, that too should be dismissed for failure to state a claim. First, plaintiffs' attack is clearly directed at the Legislature's enactment of the charter school cap through Section 89(i). "In general, neither State nor Federal legislative acts are subject to procedural due process challenges. . . . The rationale for this rule is that, regardless of whether a protected property interest is at stake, 'the legislative determination provides all the process that is due.'" *Liability Investigative Fund Effort, Inc. v. Mass. Med. Prof'l Ins. Ass'n*, 418 Mass. 436, 444 (1994) (citations omitted).

Second, plaintiffs do not allege a liberty or property interest sufficient to trigger

procedural due process protections. *See Hudson v. Comm'r of Correction*, 431 Mass. 1, 7 (2000). The "mere expectanc[y] or hope of a future benefit is neither sufficiently certain nor sufficiently material" to constitute a protected interest. *Hoffer v. Bd. of Regis. in Med.*, 461 Mass. 451, 454 (2012) (citations and internal quotation marks omitted). Property interests are not created by the federal or state constitution, but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Mancuso v. Mass. Interscholastic Athletic Ass'n, Inc.*, 453 Mass. 116, 124 (2009) (quoting *Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Allen v. Bd. of Assessors of Granby*, 387 Mass. 117, 120 (1982) (citation omitted).

Here, Massachusetts law provides that "[e]very person shall have a right to attend the public schools of the town where he actually resides" and may not be excluded from admission based on "race, color, sex, gender identity, religion, national origin or sexual orientation." G.L. c. 76, § 5. While that right is qualified by the authority of school committees to make reasonable regulations as to numbers, qualifications, and other matters, *Leonard v. Sch. Comm. of Attleboro*, 349 Mass. 704, 708 (1965) (citations omitted), "no State actor could deny [plaintiffs] a public education without complying with the requirements of the due process clause," *Mancuso*, 453 Mass. at 125.

By contrast, Section 89 does not establish an unqualified right to attend a Commonwealth or Horace Mann charter school. To the contrary, the statute specifies that "[c]harter schools shall

be open to all students, *on a space available basis*." G.L. c. 71, § 89(m) (emphasis added). Section 89 also sets forth admissions lottery procedures to determine admissions when "the total number of students who are eligible to attend and apply to a charter school . . . is *greater than the number of spaces available*." G.L. c. 71, § 89(n) (emphasis added). Thus, any entitlement created by the charter-school statute is necessarily limited to the number of spaces made available under it. The fact that plaintiffs may prefer to attend a charter school instead of a local school does not create a legitimate claim of entitlement to a number of spaces greater than specified by law.

Furthermore, even if plaintiffs were able to show a protected liberty or property interest, their claim would still require dismissal because they have been provided with constitutionally adequate processes. "The fundamental requirement of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Gillespie*, 460 Mass. at 156 (citation and internal quotation marks omitted). Here, plaintiffs do not allege that they did not receive adequate notice of their right to apply for admission to charter schools or a sufficient opportunity to participate in any admissions lottery. Nor do they allege that the defendants or anyone else failed to comply with the admission procedures set forth under Section 89.

Instead, plaintiffs appear to attack the facial validity of the procedures themselves, asserting that the mere fact that "children in less affluent communities" must participate in admissions lotteries is arbitrary and unfair. *See, e.g.*, Compl. ¶¶ 114-15. Of course, Section 89 does not distinguish between "more affluent" and "less affluent" communities in this (or any other) respect. Rather, it provides that where "the total number of students who are eligible to attend and apply to a charter school and who reside in the city or town in which the charter school is located or are siblings of students already attending said charter school, is greater than

the number of spaces available, an admissions lottery . . . shall be held to fill all of the spaces in that school from among the students." G.L. c. 71, § 89(n).

There is no inherent unfairness in allocating access to an over-subscribed program through a randomized lottery process. To the contrary, lotteries are routinely used, for example, to distribute affordable housing units in a fair and equitable manner – free of favoritism, connections, and financial influence. *See, e.g.*, 760 C.M.R. § 56.02 (DHCD regulation stating that an "Affirmative Fair Marketing Plan" for affordable housing in Massachusetts must include "provisions for a lottery or other resident selection process"). The fact that an individual who applied to a particular charter school did not win admission does not give to rise to the kind of "unfair or mistaken exclusion from the educational process" that due process protects. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). Because plaintiffs can show neither a protected interest nor a deprivation of due process, Count II must be dismissed.

CONCLUSION

For the reasons stated above, plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,

Defendants,

JAMES A. PEYSER, as Secretary of Education; PAUL SAGAN, as Chair of the Board of Elementary and Secondary Education; MITCHELL D. CHESTER, as Commissioner of Elementary and Secondary Education and Secretary to the Board of Elementary and Secondary Education; KATHERINE CRAVEN, EDWARD DOHERTY, ROLAND FRYER, MARGARET MCKENNA, MICHAEL MORIARTY, JAMES MORTON, PENDRED NOYCE, MARY ANN STEWART, and DONALD WILLYARD, as Members of the Board of Elementary and Secondary Education,

By their attorney,

MAURA HEALEY
ATTORNEY GENERAL

Robert E. Toone (BBO# 663249)
Juliana deHaan Rice (BBO# 564918)
Julia Kobick (BBO# 680194)
Assistant Attorneys General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-963-2583
Juliana.Rice@state.ma.us

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CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the penalties of perjury, that on January 17, 2017, I caused true and accurate copies of the foregoing to be served upon the following counsel through First Class U.S. Mail:

John M. Becker
Alan H. Shapiro
SANDULLI GRACE, P.C.
44 School Street,
Suite 1100
Boston, MA 02108
(617) 523-2500

Ira Fader
MASSACHUSETTS TEACHERS ASSOCIATION
2 Heritage Drive
Quincy, MA 02171-2119
(617) 878-8245

Julia Kobick
Juliana deHaan Rice
Robert E. Toone, Jr.
OFFICE OF THE MASSACHUSETTS ATTORNEY GENERAL
One Ashburton Place
20th Floor
Boston, MA 02108
(617) 963-2559

Melissa C. Allison
Scott P. Lewis
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
(617) 621-6512

Matthew Cregor
LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE
294 Washington Street,
Suite 443
Boston, MA 02108
(617) 988-0609

/s/ Felicia H. Ellsworth
Felicia H. Ellsworth (BBO# 665232)

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.

_/s/ Felicia H. Ellsworth _____
Felicia H. Ellsworth (BBO# 665232)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
felicia.ellsworth@wilmerhale.com